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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.



52.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI *EX REL.* T. D. HINES, PROSECUTING ATTORNEY OF CAPE GIRARDEAU COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JANUARY 18, 1909.

(20,968.)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 17, 1908.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the October Term, 1907, thereof, between State of Missouri, *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau County, Respondent, and Scott County Macadamized Road Company, Appellant, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if Judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of November, in the year of our Lord One Thousand Nine Hundred and Seven.

Issued at office in the City of Jefferson with the seal of the Circuit Court of the United States, for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States Circuit Court, Central Division, for the Western District Missouri.]

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by

JAS. B. GANTT,
Chief Justice, Supreme Court of Missouri.

aa [Endorsed:] No. —. United States Circuit Court, Western District of Missouri, Central Division. State of Missouri, *ex rel.* &c. Resp't *vs.* Scott Co. Macadamized Road Co. App'l't. Writ of Error to the Supreme Court of *of* Missouri. Returned and Filed. Filed Nov. 27 1907. Jno. R. Green, Clerk.

Return to Writ.

UNITED STATES OF AMERICA. *Supreme Court of Missouri, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said Supreme Court, of the State of Missouri, at the City of Jefferson, this 5th day of December, A. D. 1907.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

b The United States of America to State of Missouri, *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau County, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Missouri, wherein Scott County Macadamized Road Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Gantt, Chief Justice of the Supreme Court of Missouri, this 8th day of November, in the year of our Lord One Thousand Nine Hundred and Seven.

JAS. B. GANTT,
Chief Justice.

bb [Endorsed:] Supreme Court of Mo. State of Missouri *ex rel.* &c. Resp't, *vs.* Scott Co. Macadamized Road Co. App'l't. Citation. Filed Nov. 27 1907. Jno. R. Green, Clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, ss:

We hereby acknowledge due service of the within Citation, this 4th day of December A. D. 1907.

T. D. HINES,
R. L. WILSON,
M. A. DEMPSEY,
Attorneys for Defendant in Error.

1 In the Supreme Court of Missouri, October Term, 1907.

Court in Banc.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to-wit, on the 30th day of May, 1904, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, a certified copy of the judgment and order granting an appeal in a certain cause wherein the State of Missouri *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau County was respondent and the Scott County Macadamized Road Company was appellant, which said certified copy of judgment and order granting an appeal is in words and figures as follows, viz:

STATE OF MISSOURI, *County of St. Francois, ss:*

In the Circuit Court, May Term, A. D. 1904.

Be it remembered, that on the 9th day of May, 1904, the same being the First day of the May Term of said court, the following among other proceedings were had viz:

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Relator,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Respondent.

Change of Venue.

Now at this time, this cause having been heretofore tried and submitted to the court and by it taken under advisement until this time, and the court having fully considered all the questions involved finds the issues for the Relator; and that Respondent is wrongly operating and collecting tolls on a road being a free
2 public highway beginning at the intersection of Good Hope and Spring Streets in the City of Cape Girardeau in said county a public highway known as the Scott County Road and sometime as the Rock Levee Road runs in a Southwesterly direction along the Eastern side of the bluffs thence Southwesterly over and across what is known as the rock levee, crossing the swamp to the bluffs in Scott County, near Cape Girardeau county line, as described in Relator's petition;

It is therefore, considered, ordered and decreed that the Respondent, the Scott County Macadamized Road Company has no legal authority to operate the highway above described as a turnpike or toll road, that the said road is now a free public highway, and it is further ordered that the Respondent its officers, agents, successors and assigns, be restrained from further maintaining gates thereon, from collecting toll from travelers thereon and from in any way interfering with the public in the free use of said highway.

And afterwards, towit on the 10th day of May, 1904, the same being the Second day of the same term of said court the following other proceedings were had in said cause, to-wit:

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Relator,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Respondent.

Change of Venue.

Now comes Respondent and files its affidavit and application for an appeal to the Supreme Court of Missouri, which said application is seen and heard by the court and ordered that the appeal be granted as prayed, and that the appeal bond be fixed at the sum of $200.00 same to be approved by the Clerk of this court, and it is further ordered that Respondent be given ninety days from this date, within which time to file its bill of exceptions herein.

And afterwards towit, on the 26th day of May, 1904, the same being the Sixteenth day of the May Term of said court, the following other proceedings were had in said cause, towit:

3 STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Relator,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Respondent.

Change of Venue.

Now comes Respondent by its attorney and files bond in appeal, which said bond is ordered to be in all things approved.

STATE OF MISSOURI, *County of St. Francois, ss:*

I, J. C. Williams, Clerk of the Circuit Court within and for the county and state aforesaid, certify the above and foregoing to be a true and complete copy of the Judgment, Order granting an Appeal and filing and approving Bond in Appeal in the above entitled cause as fully as the same appears and remains of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at office in Farmington, Missouri, this 27th day of May, A. D. 1904.

[SEAL.]

J. C. WILLIAMS,
Clerk of Circuit Court,
By C. P. WILKSON, *Deputy.*

And afterwards, to-wit, on the 24th day of December, 1904, the following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Res'p.,
v.
SCOTT CO. MACAD. R. CO., App.

Now at this day, the court having fully considered and understood the motion herein to advance this cause on the docket, doth order that said motion be overruled.

4 Which said motion to advance is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney, etc., Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD CO., Appellant.

And now comes the Respondent and moves that the above entitled cause be advanced upon the docket, to the April Term 1905.

T. D. HINES,
WILSON & DEMPSEY,
Attorneys for Respondent.

Service acknowledged Dec. 20th, 1904.

GIBONEY HOUCK,
Pres. Scott Co. M. R. Co.

In the Supreme Court of Missouri.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney, etc., Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD CO., Appellant.

5 *Suggestions in Support of Motion to Advance Cause.*

And in support of the motion to advance the cause upon the docket, the Respondent begs leave to make the following suggestions.

1. The cause is public in its entire nature, and the relief sought is not for the benefit of any individual but for the public generally.

2. The petition prays for an injunction against a toll road corporation to prevent it from maintaining toll gates upon a public highway. A former corporation obtained a special charter and respondent claims that the charter expired by limitation and that all right to take tolls ceased. The Appellant, organized under the general law, claims among other things, succession to all the rights of the old company. A decree for injunction was entered but execution of the decree was stayed, pending disposition of the appeal, upon agreement that both parties would join in urging that the Supreme

Court advance the cause upon its docket, to the end that a speedy disposition of the appeal be had.

3. The above cause and that against the Cape Girardeau & Jackson Gravel Road Co. involve similar questions and should be considered together.

4. The Supreme Court in similar cases had advanced causes involving the determination of public rights.

T. D. HINES,
WILSON & DEMPSEY,
Attorneys for Respondent.

And afterwards, to-wit, on the 15th day of December, 1906, the said appellant filed its abstract in said cause, which said abstract is in words and figures as follows, to-wit:

6 In the Supreme Court of Missouri, October Term, 1906.

No. 12667.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Appellant's Abstract of the Record.

Relator's petition is in the following words, omitting the caption:

"Plaintiff for its cause of action states that begining at the intersection of Good Hope and Sprigg Streets in the City of Cape Girardeau, in said County, a public highway known as the Scott County road and sometimes as the Rock Levee road, runs in a southwesterly direction along the eastern side of the bluffs, thence southeasterly over and across what is known as the rock levee, crossing the swamp to the bluffs in Scott County, near the Cape Girardeau County line.

That said road is now and has been a public highway for more than thirty years, and is the main thoroughfare between the City of Cape Girardeau and the town of Benton, the county seat of Scott County, and the town of Kelso and other towns in Scott County; that the defendant is a corporation, organized under the laws of the State of Missouri, and that it, without right or authority, maintains on and across said highway at various points, to-wit, near the city limits of Cape Girardeau and near the northern end of the rock levee, certain bars and obstructions, commonly known as toll gates, and that it prohibits and prevents the public from making free and proper use of said public highway.

Plaintiff further states, that the existence and maintenance of said toll gates and other obstructions to free travel over said road constitute a continuous public nuisance.

Petitioner, therefore, prays that the said nuisance be abated and that the defendant, its officers, agents, servants, successors and assigns be perpetually enjoined from in any way further obstructing said

highway, and from preventing free travel thereover, and for such other and further relief as the Court may deem meet.

7

THOMAS D. HINES,
Prosecuting Attorney, Cape Girardeau County, Missouri.
ROBERT L. WILSON,
FRANK E. BURROUGH,
M. A. DEMPSEY,
Att'ys for Plaintiff."

By consent of parties change of venue was granted to St. Francois County, and the defendant then filed an amended answer to plaintiff's petition, which is as follows, omitting the caption:

"Comes now the defendant in the above cause and for its amended answer to the plaintiff's petition, denies every allegation, statement and averment in said petition contained and all knowledge and information sufficient to form a belief thereof, except where in this answer, a statement, allegation or averment of said petition may be expressly admitted.

I. And for further answer herein defendant says that it admits that a public street or public highway begins at the intersection of Good Hope and Sprigg streets in the city of Cape Girardeau, in the county of Cape Girardeau, State of Missouri, and runs thence south to the city limits of said city of Cape Girardeau; and avers that the said street or public highway belongs to and is a part of the streets of the city of Cape Girardeau and has been paved and macadamized by said city of Cape Girardeau as a city street, and that said defendant in the above entitled cause has no interest, right or claim in said street so located in the city of Cape Girardeau and never has had any right, title or claim to the same, and further answering avers that the defendant herein, the said Scott County Macadamized Road Company, claims no interest in said public street of the city of Cape Girardeau, extending from the interesection of Good Hope street and Sprigg street south to the city limits, and never claimed any right therein, nor exercised any control over the same, or in any manner interfered with the free use of the said street extending from said intersection of Good Hope street and Sprigg street or road known as Sprigg street of the city of Cape Girardeau.

II. And further answering the said defendant says that there is not now, and that there never has been at any time a free public highway known as the Scott County road or as the Rock Levee beginning at the city limits of the city of Cape Girardeau and where said Sprigg street terminates and running thence in a southwesterly direction along the eastern side of the bluffs and thence southwesterly over and across the swamp to the bluffs in Scott county; and especially defendant denies that there has been a free public highway from the intersection of Good Hope and Sprigg streets in the city of Cape Girardeau or from any other point in said city of Cape Girardeau as set out in said petition of plaintiff, over and across the rock road or rock levee or the property belonging to the Cape Girardeau and Scott County Macadamized Road Company, or its successor or grantee, the Scott County Macadamized Road Company.

8 Denies that this road is now or that it had been a free public road for more than thirty years as in the petition set out or intended to be set out.

Denies that a free public road such as is described in plaintiff's petition ever existed on the line and route as in said petition set out.

Denies that the plaintiff, that is to say, the public at large, ever had any interest in the said highway or public road of defendant or defendant's grantor.

Denies that the defendant maintains, without right, certain bars and obstructions known as toll gates, and avers that the said toll gates maintained by defendant are authorized by law and maintained according to law, and that defendant collects only such toll and no more as is authorized by law to be collected for the use of its said macadamized or metal road.

III. And further answering defendant says that it is a corporation, duly incorporated under the laws of the State of Missouri, that as such it is authorized and empowered by law to own a macadamized road and that it does own a macadamized and metal road, or a turnpike road, between the counties of Scott and Cape Girardeau, beginning at the south end of Sprigg street, a public street of the city of Cape Girardeau, and leading thence and on the north side of the bottom known as Big-Swamp and across said bottom known as Big-Swamp, and avers that the part of its said road which runs across the swamp was located and constructed in the years 1853, 1854 and 1855 by its grantor, the Cape Girardeau & Scott County Macadamized Road Company, over and on property then owned by Wilson Brown and Simeon English and others, and on certain lands owned by the United States, and that the said Cape Girardeau and Scott County Macadamized Road Company located its said road over and across the said lands of said Wilson Brown, Simeon English and others by their consent and without any objection on the part of the State of Missouri or the United States; and that it cleared a right of way sixty feet wide, threw up an embankment and levee and ditched and macadamized with stone and other hard metal, its road way at great expense, and that, in the years 1872 and 1873, the said Cape Girardeau & Scott County Macadamized Road Company procured its right of way along the north side of said swamp by condemnation, donation and purchase, and in said years constructed its said road by clearing out the right of way, throwing up an embankment and ditching the same, and macadamizing the said road to its northern terminus at the foot of Sprigg street at great expense, and the said defendant avers that no part of the said property now occupied by the roadway of defendant or its grantor was ever a public road at any time. And further defendant avers that at the time its said road way was constructed in the years 1853, 1854 and 1855 across the said bottom or Big-Swamp, the main thoroughfare from Benton to Cape Girardeau was located at some other point and not over and across the road now owned by the defendant or its grantor, and defendant avers that after its said road was constructed, and the said road being the only macadamized and metal road across the said big bottom or big swamp, it became the main thoroughfare from

Benton to Cape Girardeau and to other points in the county of Cape Girardeau and other counties north and west, and avers that the construction of the said macadamized and metal road diverted and attracted the travel across the route of the said defendant and its grantor, it being the only practicable, convenient and cheap method of getting across the said swamp in bad weather.

9 And further defendant avers that prior to the construction of the said road during a large part of the year it was almost impossible to cross the said swamp or big bottom, and that large sums of money were paid, to-wit: from three to five dollars to owners of ox teams to pull wagons across the said big-bottom or big-swamp, and that the construction of the said macadamized road by defendant's grantor was of great public utility and benefit to the people of all the counties south of Cape Girardeau as well as those lying north of Cape Girardeau, and that the cost of constructing said road aggregated the sum of thirty thousand dollars, and that at no time since the said road has been constructed did the said stockholders of the said company realize more than five per cent. on one-half of said sum, to-wit: fifteen thousand dollars invested in the construction of said macadamized and gravel road.

That its receipts from tolls for a number of years last past have averaged only about $1,400.00 per annum, and that the ordinary annual expenses of operating and maintaining its road during the same time have averaged $1,400.00 per annum; that it has always been necessary for it to incur certain extraordinary expenses in maintaining and operating its road by reason of its being constructed over the aforesaid big swamp or bottom; that the soil of said swamp is of a wet and spongy nature, always permeated with water and peculiarly unadapted for supporting hauling of heavy weights; that the stone and gravel placed on its embankment across the said big swamp, sink by their own weight into the spongy soil or gumbo; that more rock must be piled on this which soon sinks again, thereby causing great expense; that the ground on each side of its embankment is almost level, and that it is necessary to protect its embankment to drain the water out of the ditches, which can only be done by extending said ditches on each side into the swamp, which is another source of great expense; that said big swamp is three miles wide and in flood time acts as an outlet for the high water of the Mississippi river; that three times during the ten years last past this part of its road has been almost all washed away by the said high water of the Mississippi, and has been rebuilt from time to time at great loss to the company.

The defendant further says that the grade of the first four miles of its road leading from the city of Cape Girardeau is built along the side of the hills; that the entire said four miles is expensive to maintain, especially along the hills, that portions of the hills above the road having frequently given away and slipped down upon defendant's road has entailed great expense upon defendant to repair the same, and that from the nature of the soil over and along which said road is built it is impossible to protect its road except at great expense; that from time to time the road has not only failed to pay

expenses, but has been operated at a loss, and that the stock-
10 holders have often advanced large sums of money to the said road and maintained it at their individual expense, for which sums they have never been reimbursed.

And further that it is only within the last ten years that a dividend of four per cent. per annum was paid on its capital stock, and that for the first thirty years after the construction of its said road it paid no interest whatever on the capital invested; that from 1860 to 1864, during the civil war said road was used by the United States for passage and transportation of its military arms, artillery and heavy army wagons without compensation being paid and greatly injured by said use, so that after the close of the war large sums had to be expended in the reconstruction of said road, all of which required the total income of said road, as well as the damage done said road by the great flood of 1858, which passed over said road at the depth of eight feet, washing away the macadam, which had been replaced when the war began.

This defendant also says that at the time the Cape Girardeau and Scott County Macadamized Road was built the Mississippi river at Cape Girardeau was the only outlet for the surplus productions of Scott and Cape Girardeau counties, but that within a few years after its macadam or metal road was constructed the St. Louis, Iron Mountain and Southern Railroad was constructed and cut off and absorbed the trade that had and would have come to Cape Girardeau over the road of this defendant; that afterwards the Cape Girardeau and Southwestern, the St. Louis & Southwestern, the St. Louis and Gulf railroads maintained and still maintain stations on or near the line of this company's turn-pike, which several lines and stations have diverted a large amount of travel from said road and have diminished this company's earning capacity very largely.

The defendant further says that there is and has been for a long time past, to-wit, since its organization, a public road to Cape Girardeau parallel to its line, which was and is traveled largely by the public, so that the public have only availed themselves of its macadam or metal road in times of bad weather, the effect of which has still further impaired the earning capacity of this defendant and destroyed or diminished its dividends.

IV. And for a further answer this defendant says, that by an act of the General Assembly of the State of Missouri, duly passed and approved February 24th, 1853, James Cannon, Wilson Brown, Nathaniel W. Watkins, Thomas Johnson, Abraham Hunter, Peter Byrne and Amasa Alton and such other persons as they may associate with them *and* were created a body politic and corporate, by the name and style of the Cape Girardeau and Scott County Macadamized Road Company, and by the terms and provisions of said act of the General Assembly of the State of Missouri, the said General Assembly then and there contracted and agreed with the said Cape Girardeau and Scott County Macadamized Road Company, as follows, to-wit: That the said Cape Girardeau and Scott County Macadamized Road Company should have the *exclusive privilege* of constructing a macadamized road across the big swamp, in the coun-

ties of Cape Girardeau, and running across said swamp, a distance of three or four miles, with the *privilege of extending the same to the city of Cape Girardeau;* that said Cape Girardeau and Scott County Macadamized Road Company *may and shall have perpetual succession as such*, and may make and use a common seal, and the same to alter at pleasure, and that any time after the expiration of twenty years from the passage of said act, the said counties of Cape Girardeau and Scott should have the right to purchase said road for the purpose of making the same a free road; *but that in the event that said sale should be made as provided in said act, the said counties of Cape Girardeau and Scott should pay to the said Cape Girardeau and Scott County Macadamized Road Company the actual cost of the construction of the same.* That the consideration for said last named agreement was that the said Macadamized Road Company should build a macadamized road across said big swamp with a double or single track as the company might select; provided, that if constructed with a single track only, suitable and convenient *turnouts* or places for wagons should be provided at intervals of not more than fifty rods. That relying upon said act of the General Assembly, and believing that the terms, provisions and agreements in said act contained would be upheld and carried out by the State of Missouri, said Cape Girardeau and Scott County Macadamized Road Company went to work as soon as could be done after the passage of said act, to construct and build, and during the years of 1853, 1854 and 1855 did build and construct said road and complete the same across the Big Swamp, in accordance with the requirements of said act, and that afterwards, to-wit, during the year 1873 it did, in pursuance of the provisions and agreements of said act, extend the said road to the city of Cape Girardeau, by building and constructing a macadamized road from the north end of the road constructed in the years 1853, 1854 and 1855 as aforesaid, to the south end of Sprigg street of said city of Cape Girardeau; that said road was built by said Macadamized Road Company at great expense for labor and materials, to-wit, the sum of thirty thousand dollars, that said Cape Girardeau and Scott County Macadamized Road Company was at all times willing to sell its said road to said Cape Girardeau and Scott counties in accordance with the requirements of said act of the General Assembly, and in the year 1885 and thereafter said Cape Girardeau and Scott County Macadamized Road Company offered said road for sale and urged said counties to take said road on the terms provided by said act of the General Assembly, but defendant says that said counties wholly failed and refused to buy said road. Wherefore defendant now pleads said act of the General Assembly in bar of plaintiff's right to recover in this action and prays judgment.

11

And defendant further avers that it acquired the said road from its grantor by issuing to the said stockholders of the said grantor fifteen thousand dollars of its paid up capital stock for its said road.

V. And defendant further answering says that the proceedings of plaintiff under this petition violates Sections 4, 15, 21, 30 and 32, Article 2 of the Constitution of the State of Missouri, and section

9, paragraph 3, and section 10, Article 1, section 4, Article 4, and the 5th and 14th Amendment- of the Constitution of the United States, and which said several sections heretofore set out, in effect, provide that private property, to-wit, the property of the defendant cannot be taken without due compensation and process of law, and the said defendant pleads said several sections and provisions of the Constitution of the United States and of the State of Missouri in bar to the pretended cause of action set up in the petition and proceedings of plaintiff in this behalf instituted.

12 VI. Defendant further says that it purchased the said macadamized and metal road for a valuable consideration, to-wit, the sum of fifteen thousand dollars in its full paid up capital stock, and which was issued and delivered to its grantor, to-wit, the last board of directors and trustees of the Cape Girardeau and Scott County Macadamized Road Company, a corporation organized under the laws of the State of Missouri in that behalf and for the purpose of constructing a macadamized and metal road across the Big swamp over a place known as the levee, and further defendant avers that under the laws of the state of Missouri, after the expiration of the charter of the said Cape Girardeau and Scott County Macadamized Road Company the last board of directors and trustees of said company had good right to sell and convey the private property and assets belonging to said Cape Girardeau & Scott County Macadamized Road Company to a new company organized for the purpose of owning said road; and that it is the well-settled policy, established by the law of this state to authorize a conveyance of the property belonging to such corporation whose charter has expired to convey its property to a new corporation organized in that behalf. And defendant denies that the stockholders of said Cape Girardeau and Scott County Macadamized Road Company have ever been reimbursed in full or for any part of the capital invested by them in the construction of the said road, and further avers that under the laws of the state of Missouri and of the United States the Cape Girardeau and Scott County Macadamized Road Company was authorized to transfer all the property it owned at the time of the expiration of its charter, as well as all other property and assets of whatever kind to another corporation organized to take over and operate the said macadamized and metal road owned by the said Cape Girardeau and Scott County Macadamized Road Company, and defendant avers that it for a valuable consideration has acquired the said macadamized and metal road and all the assets, land, real estate and property of the said Cape Girardeau & Scott County Macadamized Road—and that it is now the lawful owner thereof and in lawful possession thereof and further that it has acquired a title in fee simple to the said macadamized and metal road and right of way sixty feet wide from the owners of the fee adjacent and bordering upon the said road and that it is lawfully possessed of the same in fee simple by reason of said conveyance and that the said plaintiff has no interest or right to the said macadamized and metal road or to the said right of way or any part thereof in law or equity.

And having fully answered defendant prays that the court will

dissolve the temporary injunction heretofore issued in this behalf and to be discharged hence and for its costs in this behalf expended.

M. R. SMITH,
ROBT. G. RANNEY,
GIBONEY HOUCK,
Attorneys."

To which amended answer relator filed its replication as follows, omitting caption and signatures:

"Comes now the relator and for replication to defendant's amended answer denies each and every allegation of new matter therein contained, except such as may be hereinafter specifically admitted, and prays judgment as heretofore.

13 And further replying, relator denies that this respondent is authorized and empowered by its charter to own the macadamized turnpike road between the counties of Cape Girardeau and Scott *Counties* as set out in its answer, but that it is only authorized under its charter to construct and build a new road; denies that part of the road now claimed by it across the bottom known as the "Big Swamp" was located and constructed in the years 1853, 1854 and 1855 by its grantor, the Cape Girardeau and Scott County Macadamized Road Company over the property then owned by Wilson Brown, Simeon English and others and the United States, but avers specifically that the road constructed by said Cape Girardeau and Scott County Macadamized Road Company through said swamp was constructed over, along and upon a public county road from Benton, the county seat of Scott County, to Jackson, the county seat of Cape Girardeau County, and known variously as the "Jackson and Benton Road," "The Benton and Jackson Road," "The Levee Road," "The Big Swamp Road," and the "road through the big swamp," which part of said county and public road was of a distance of approximately three miles, and had been maintained at the expense of and under the supervision of the respective counties of Cape Girardeau and Scott for many years prior to 1853; denies specifically that said Cape Girardeau and Scott County Macadamized Road Company cleared a right of way sixty feet wide, threw up an embankment and levee, and ditched said road; and avers that said clearing, the making of said levee and embankment and ditching had been done prior to its incorporation by the public authorities; and that the only work done by said Macadamized Road Company on the public road across the "Big Swamp" was to macadamize and otherwise repair same under its charter.

[illegible]or admits that during the years 1872 and 1873 and subse[illegible]ay, the said Macadamized Road Company secured a portion of a right of way along the north side of said swamp by condemnation, donation and purchase and constructed a macadamized road from the north end of the levee to the south end of Sprigg street, Cape Girardeau, Mo.; denies that in the years 1853, 1854 and 1855, the main thoroughfare from Benton to Cape Girardeau was at some point other than the point over which said levee had been constructed, but re-avers that said levee constituted a part of the main thoroughfare from

Benton to Jackson and from Benton to the city of Cape Girardeau, used by the public and maintained by the county officers of Scott and Cape Girardeau county.

And further replying relator denies that the proceeding herein is violative of the sections of the State and Federal constitutions as set forth by respondent in its answer.

And further replying relator says that the respondent herein has no paid up capital stock; that it did not deliver to the last board of directors of the Cape Girardeau and Scott County Macadamized Road Company any paid up capital stock, and avers and charges the truth to be that the said Macadamized Road Company was incorporated under a special act of the legislature of the State of Missouri, approved February 24th, 1853, entitled "An Act to incorporate the Cape Girardeau and Scott County Macadamized Road Company" under and by virtue of which it had the authority to build a macadamized
14 road from Cape Girardeau to Scott County and occupy the levee aforesaid with the right to take tolls thereon for a period of fifty years. That said right expired on the 24th day of February, 1903, whereupon the road so constructed by said company was and became a free public highway, disburdened of the right of said Mcadamized Road Company to take tolls thereon; that said Macadamized Road Company had no power or authority under its charter to acquire any fee simple title whatever, and that its only right and authority was to acquire easements or rights of way for the purposes of said road; and it did not acquire any fee simple title to the roadbed; that it had no power or authority to sell or convey to this respondent or to anyone else its right to take tolls or its road bed; that the stockholders of the said Macadamized Road Company, after the expiration of its charter in order to deprive the public of its free public highway, organized a new corporation known as the Scott County Macadamized Road Company, and caused a pretended conveyance to be made by the last board of directors of the old company of the roadway, property and franchises of the said Cape Girardeau and Scott County Macadamized Road Company to this respondent.

That the respondent company had no assets; that no money was paid for its capital stock and that the whole transaction was a scheme contrived to attempt to perpetuate the wrongful and unlawful claim to take tolls forever over the road aforesaid.

Relator avers that the entire road now claimed by the respondent from Cape Girardeau to the north end of the levee and across the levee in Scott County was by its construction and opening to the public dedicated by the company constructing it to the public, and thereby became and was and has ever since been a public highway used by the public at all times, subject only to the right of the former company to maintain toll gates up to February, 1903.

Relator again charges that at the expiration of the charter of the former company, to-wit, on February 24th, 1903, all the roadway, rights and franchises of said company vested in the public and said road became a free public highway by operation of law, and that this respondent is unlawfully obstructing said highway by its toll gates to the great injury of the public, and again prays judgment for a

perpetual injunction as heretofore and for his costs in this behalf expended."

Relator to sustain the issues on his part offered and introduced the following evidence:

Mr. DEMPSEY: Relator first offers in evidence the charter of the Cape Girardeau and Scott County Macadamized Road Company.

Mr. SMITH: We desire to interpose an objection to the introduction of any testimony for the reason that the petition does not state facts sufficient to constitute a cause of action and further that there is no party sufficiently described by the allegations of this petition that has a right to bring a suit of this kind disclosed in the petition.

By the COURT: The objection will be overruled.

To which ruling of the court appellant objected and excepted at the time.

15 Relator offers in evidence the charter of the Cape Girardeau and Scott County Macadamized Road Company entitled "An Act to Incorporate the Cape Girardeau and Scott County Macadamized Road Company" enacted by the General Assembly of the State of Missouri, approved February 24th, 1853, as appears in the Session Laws of Missouri of 1853 at page 337, as relator's Exhibit "A."

"Be it Enacted by the General Assembly of the State of Missouri, as follows:

1. That James Cannon, Wilson Brown, Nathaniel W. Watkins, Thomas Johnson, Abraham Hunter, Peter Byrne and Amasa Alton, and each other person as they may associate with them, and *their successors*, be and hereby are created a body politic and corporate, by the name and style of the Cape Girardeau and Scott County Macadamized Road Company, with a capital stock of fifteen thousand dollars, to be divided into shares of fifty dollars each; *and may and shall have perpetual succession as such*, and may make and use a common seal, and the same to alter at pleasure.

2. The said company shall have the *exclusive privilege of constructing a macadamized road across the big swamp*, in the counties of Cape Girardeau and Scott, where said swamp commences below the city of Cape Girardeau, and running across said swamp a distance of three or four miles, with the *privilege of extending the same to the city of Cape Girardeau;* said road to be located on what is called the levee, or between the levee and the Missouri river.

3. Said road shall be constructed with a double or single tract (track) as the company may select; provided, that if constructed with a single tract (track) only suitable and convenient turn outs or places for wagons shall be provided at intervals of not more than fifty rods.

4. The affairs of said company shall be managed by a board of five directors, elected bi-ennially, one of whom shall be appointed president, and said directors shall be elected by the stockholders, each share of stock entitling the holder to one vote; and said board shall have full power to adopt all by-laws and regulations necessary for the management of the affairs of the company, and for the ap-

pointment of any other officers and agents of the company that may be necessary; provided, that no such by-law or regulation shall be repugnant to the laws and constitution of this state.

5. The County Court of the counties of Cape Girardeau and Scott are authorized to invest any of the funds of said counties in the stock of said company, and may appoint a suitable agent or agents to attend to the interests of said counties in said company, and to vote at all elections of officers of the company.

16 6. The stock of said company shall be deemed and held as personal property, and shall be exempt from all taxes for state or county purposes.

7. The company may erect suitable toll gates, and charge toll for passing over said road, not to exceed the following rates for the whole distance, to-wit, for each wagon or vehicle drawn by six animals, sixty-five cents; for each wagon or vehicle drawn by four animals; fifty cents; for each wagon drawn by two animals, thirty-five cents; for each wagon or cart drawn by one animal, twenty cents; for a man and horse, ten cents; each pleasure carriage, drawn by two horses, forty cents; each pleasure carriage drawn by one horse, twenty cents, for each foot passenger, five cents; for sheep, hogs, yearling cattle, each one cent; for other cattle, mules or horses, each five cents.

8. The *privileges* granted in this charter shall continue for fifty years: *Provided, that the County Courts of the Counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road.*

9. The corporation (corporators) named in this act, or a majority of them, may meet at such time and place, and upon such notice as they may select and agree upon, and organize as a board of directors, make such regulations as they may deem proper, for the opening of books for the subscription of stock; and so soon as three thousand dollars is subscribed, shall call a meeting of the stockholders for the election of a permanent board of directors, which board shall hold office for two years and until their successors are duly elected and qualified.

This act to take effect and be in force from and after its passage."

Approved February 24, 1853.

Relator next offered in evidence a certified copy of the order of the County Court of Cape Girardeau County entered of record on the 20th of November, 1847, and asks that the same be marked Exhibit "B," as follows, omitting caption:

"Ordered by the Court that the sum of Fifty dollars be appropriated out of the Road and Canal fund for the purpose of

17 repairing the road across the Big Swamps, and it is further ordered that Simeon English be and is hereby appointed Commissioner to superintend the necessary repairs that can be made with said appropriation, and that the same be Certified to the Treasurer for payment."

Mr. HOUCK: We object to this, Your Honor, on the ground that

there was a general law by which a state or county road should be laid out; that law provided a certain mode of procedure, that a petition should be presented to the County Court, that a survey should be made of the road and that the survey with the courses and distances *and* filed with the County Court, and before they introduce any order the relator show that a county road was established over the road on which our Macadamized Road Company built its line of road; there is no foundation laid for the introduction of this evidence and it is irrelevant and incompetent.

By the COURT: It will be admitted now. Let the records show, Mr. Stenographer, that the objection will be overruled for the present; I have got to hear all the testimony before I can pass on the question.

To which ruling of the Court Appellant objected and excepted at the time.

Relator next offers in evidence an order of the County Court of Cape Girardeau County, entered of record on the 17th day of May, 1848, and asks that the same be marked Exhibit "C," as follows:

"Ordered by the Court that A. H. Brevard be appointed Overseer of the road from Jackson to the Big Swamp on Division No. 1, commencing at the bounds of Jackson and ending at the Township line, to serve one year and until another be appointed."

Relator next offers in evidence a certified copy of the order of the County Court of Cape Girardeau County entered of record on the 13th day of September, 1849, and asks that the same be marked Exhibit "D," as follows:

"Ordered by the Court that the sum of Forty Dollars be appropriated out of the Road and Canal fund for the purpose of making the necessary repairs on the Bridge between Simeon English's and the Levee, and that Simeon English be appointed Commissioner to contract for and superintend the making the necessary repairs on said Bridge, and that whenever the same is finished and received by the said Commissioner, that the Clerk of this Court certify the above allowance to the Treasurer for payment."

Mr. SMITH: We make the same objection and exception after each one of these orders, assuming the Court to make the same ruling.

Relator next offers in evidence an order of the County Court of Cape Girardeau County entered of record on the 15th day of December, 1849, and asks that the same be marked Exhibit "E," as follows:

18 "Road from Jackson to the Big Swamp (or Benton, Scott Co.)

No. 1. Commencing at the Corporation line of the Town of Jackson and ending at the Pond at the Fork of the road. A. H. Brevard, Overseer.

No. 2. Commencing at the Pond at the Fork of the Roads and ending at the middle of Randols' Creek. John Hitt, Overseer.

No. 3. Commencing at Randols' Creek and ending at the Old Shop near Wid. Abernathy's. Elisha Freeze, Overseer.

No. 4. Commencing at the Old Shop near Widow Abernathy's and ending at Simeon English's. D. B. Harbison, Overseer.

No. 5. Commencing at Simeon English's and ending at Scott County line." Simeon English, Overseer.

Same objection and exception by Appellant.

Relator next offers in evidence certified copy of the County Court of Cape Girardeau County entered of record on the 30th day of May, 1850, and asks that the same be marked Exhibit "F," as follows:

"Now at this time comes Elisha Freese, Overseer of Road Division No. 3 on the road from Jackson to the Big Swamp, and it appearing to the satisfaction of the Court that said Overseer did employ John P. Hitt to work on said road with a Team and Plough two days more than the Law requires a person to work on roads; It is therefore ordered by the Court that said John P. Hitt be allowed out of the Road and Canal fund the sum of Three dollars, for said work done on said Road as aforesaid, according to the provisions of an Act of the General Assembly of this State entitled "an Act Amendatory of an Act entitled an Act for opening and repairing Public Roads and Highways." Approved 10th of March, 1849, and that the Clerk of this court certify to the Treasurer the above allowance."

Same objection and exception by Appellant.

Relator next offers in evidence order of the County Court of Cape Girardeau County entered of record on the 7th day of October, 1850, and asks that the same be marked Exhibit "G," as follows:

"Ordered by the Court that Peter Byrne be appointed Commissioner to contract for and superintend the making the necessary repairs on the road from Jackson to the Big Swamp (or to Benton, Scott County, Mo.) known as the Levee, thereon and the Bridge thereon—and that the sum of One Hundred dollars be and the same is hereby appropriated out of the Road and Canal fund for the purpose of making the necessary repairs on said Road. Ordered Sheriff to serve said Byrne with a copy of this Order. Ordered that said Byrne make report of his proceedings thereon to this Court according to Law, and that the Clerk certify this allowance to the Treasurer for payment."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of the
19 County Court of Cape Girardeau County entered of record on the 22nd day of May, 1851, and marked Exhibit "H," as follows:

"Ordered by the Court that the order heretofore made appropriating the sum of One Hundred dollars out of the Road and Canal fund for the purpose of repairing the road across the Big Swamp and on which Peter Byrne was appointed Commissioner, be rescinded, set aside and held for naught."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Cape Girardeau County entered on the 22nd day of May, 1851, marked Exhbit "I," as follows:

"Ordered by the Court, that the sum of Eighty dollars be appropriated out of the Road and Canal fund, for the purpose of mak-

ing the necessary repairs on the road across the Big Swamp, and that Peter Byrne be appointed Commissioner to contract for and superintend the making of said repairs and that he report his proceedings thereon to this Court, and that the Clerk of this Court certify the above allowance to the Treasurer of this County for payment."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Cape Girardeau County entered on the 21st day of May, 1853, marked Exhibit "J," as follows:

"Ordered by the Court that the sum of Two Hundred dollars be and the same is hereby appropriated out of the Road and Canal fund of the County of Cape Girardeau for the purpose of making repairs, on the Levee across the Big Swamp on the road between the Town of Jackson in Cape Girardeau County and the Town of Benton in Scott County, and that Samuel Collins be appointed to superintend the making said repairs."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Cape Girardeau County entered of record on the 9th day of September, 1853, and asks that the same be marked Exhibit "K," as follows:

"Road from Jackson to Benton.

No. 1. Commence at the Corporation line of Jackson and end at Randol Creek. Henry Wells, Overseer.

No. 2. Commence at the middle of Randol Creek and ending at the old Bohannon place. Rob't Hitt, Overseer.

No. 3. Commence at the old Bohannon place and end at the Sim. English farm. D. H. Harbison, Overseer.

No. 4. Commence at the Sim. English farm and end at the Scott County line. A. G. English, Overseer."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Cape Girardeau County entered of record on the 29th day of November, 1853, and asks that the same be marked Exhibit "L," as follows:

20 "Ordered by the court that Samuel Collins, heretofore appointed Commissioner to superintend the repairs of the Levee across the Big Swamp on the road from Jackson to Benton, be allowed out of the Road and Canal fund the sum of Forty-three dollars and Sixty-five cents, as a balance due him as such Commissioner, and that the Clerk of this Court certify this allowance to the County Treasurer for payment."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Scott County entered of record on June 10th, 1850, marked Exhibit "M," as follows:

"Ordered by the court that the public roads of this county be laid off into road districts as follows, to-wit: That portion of said

roads leading from the public square in the town of Benton to the township line dividing townships Moreland and Kelso on the road from Benton to Jackson shall be known and designated as District No. one. And that portion of said roads extending from the public square in the town of Benton to the line dividing townships Moreland and Commerce on the road from Commerce to Benton shall be known and designated as District No. two. And that portion of said roads extending from the public square in the town of Benton to the line dividing townships Moreland and Sandy Woods *township* on the road from Benton to Charleston shall be known and designated as District No. three. And that portion of said roads extending from the public square in the town of Benton to the lines dividing townships Moreland and Richland on the road from Benton to New Madrid shall be known and designated as District No. four. And that portion extending from the forks of the road near the Hunter farm to the township line dividing the townships Richland and Moreland on the road from Benton to Carpenter's Ferry shall be known and designated as District No. five. And that portion extending from the forks of the road near the Gum Swamp to Mrs. Norman's branch shall be known and designated as No. six. And that portion extending from Mrs. Norman's branch dividing townships Kelso and Moreland shall be known and designated as District No. seven. And that portion extending from the public square in the town of Benton to the line dividing townships Moreland and Kelso on the road from Benton to the residence of the late William Cox's shall be known and designated as District No. eight. And that portion of said road extending from Alexander Montgomery's to the forks of the road on the hill where said road intersects with a road leading from Benton to the late residence of Cox's shall be known and designated as District No. nine. And that portion commencing at the Catholic church near the residence of Hugh Dobbins and extending to the line dividing townships Moreland and Kelso shall be known and designated as District No. ten.

And that portion extending from the old township line near the town of Commerce to the Cypress Creek shall be known and designated as District No. eleven. And that portion of said roads
21 extending from the Cypress Creek to the line dividing Counties of Scott and Cape Girardeau shall be known as District No. twelve. And that portion extending from the late residence of Wilson Brown to the line dividing townships Kelso and Moreland shall be known as District No. thirteen. And that portion extending from the township line near the residence of Thomas J. Calhoun dividing townships Kelso and Moreland to the line dividing the Counties of Cape Girardeau and Scott shall be known and designated as District No. fourteen. And that portion extending from Baldings Landing to the road leading from Benton to Jackson near the farm of Paschal E. Ancell's shall be known and designated as District No. fifteen.

And that portion extending from the road leading from Jackson to Benton near the late residence of Edwin A. Buckner's to the line dividing townships Moreland and Kelso on the road to the Catholic

church shall be known and designated as District Number sixteen. And that portion extending from the county line dividing the counties of New Madrid and Scott near the dwelling house of Mrs. Hannah Stallcup's to a point at the lower part of the John B. Lafoe old place on the road from New Madrid to Benton shall be known and designated as District No. seventeen. And that portion extending from a pond at the lower part of the John B. Lafoe old place to the line dividing townships Moreland and Richland on the road from New Madrid to Benton shall be known and designated as District number eighteen. And that portion extending from the township line dividing townships Moreland and Kelso to Carpenter's Ferry on Little River on the road from Benton to Bloomfield shall be known as District number nineteen. And that portion commencing at the River bank in the town of Commerce and extending to the township line dividing townships Moreland and Commerce shall be known as District number twenty. And that portion extending from the townships Tywappity and Commerce to the Oaks farm opposite the old house on the road from Charleston to Commerce shall be known and designated as District number twenty-one. And that portion extending from the old township line dividing townships Commerce and Kelso on the banks of the river to the Oaks farm opposite the old house on the road from Commerce to Charleston shall be known and designated as District Number twenty-two.

And that portion extending from the forks of the road near James Wilborns to the old line dividing townships Commerce and Kelso shall be known as District number twenty-three. And that portion extending from the town of Commerce to Charles Moore's at the intersection of the old road leading from Commerce to the Levee on the Big Swamp shall be known as No. Twenty-four. And that portion extending from the line dividing the Counties of Scott and Mississippi to the township line dividing townships Commerce and Tywappity near the residence of Edward Kew's shall be known as District number twenty-five. And that portion which extends from the forks of the road near the residence of Anderson Embry's to the line dividing Tywappity and Sandy Woods — on the road leading from Charleston to Benton shall be known as District
22 number twenty-six. And that portion which extends from the old County line at the north part of John S. Schnitgers land to the forks of the road near David Sweetens shall be known as number twenty-seven. And that portion of the road which extends from Price's Landing to the old County line near Milton Fowlers shall be known as District number twenty-eight. And that portion which extends from the township line dividing townships Moreland and Sandy Woods to the line dividing townships Sandy Woods and Tywappity on the road from Benton to Charleston shall be known as District number twenty-nine. And that portion of said road which extends from the Hunter Lake to the Iron Banks road intersecting the same at Ephram Lemley's shall be known and designated as Number Thirty."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the

County Court of Scott County entered of record on the 11th day of June, 1850, and marked Exhibit "N," as follows:

"Ordered by the court that Edward Hope be appointed overseer of road district No. one, extending from the public square in the town of Benton to the line dividing townships Moreland and Kelso on the road from Benton to Jackson."

Same objection and exception by Appellant.

Relator next offers in evidence an order of the County Court of Scott County entered of record on the 2nd day of September, 1850, marked Exhibit "O," as follows:

"Ordered by the Court that the sum of fifty dollars of the three per cent. Road and Canal fund of this county be appropriated to the repairing of the road across the Big Swamp on the road leading from Benton to Jackson and that Paschal E. Ancell be appointed Commissioner to superintend said work."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Scott County entered of record on the 9th day of August, 1863, marked Exhibit "P," as follows:

"Ordered by the court that two hundred dollars of the Internal Improvement fund of this county be appropriated to the improving and repairing the road across the Big Swamp on the road from Benton to Cape Girardeau and that Henderson Winchester be appointed commissioner to superintend said work provided that said commissioner shall not expend any part of said appropriation until said commissioner is satisfied that the County of Cape Girardeau will repair that part of the Big Swamp which lies in Cape Girardeau County."

Same objection and exception by Appellant, and for the reason order was made after the construction of Respondent's road was begun.

Relator next offers in evidence a certified copy of an order of the County Court of Scott County entered of record on the 11th
23 day of December, 1853, marked Exhibit "Q," as follows:

"Ordered by the Court that Henderson Winchester be allowed the sum of Two hundred and six dollars and seventy-five cents for work caused to be done on the road across the Big Swamp to be paid out of the Internal Improvement fund of this county and that Clerk of this court draw a warrant on the Treasurer of this County accordingly."

Same objection and exception by Appellant.

Relator next offers in evidence a certified copy of an order of the County Court of Scott County entered of record on the 26th day of July, 1855, marked Exhibit "R," as follows:

"Ordered by the court that the public road of this county be laid off into road districts as follows to-wit:

The road leading from the county line near the residence of Mrs. Hanna Stallcup's to the lower end of the townships Moreland and Kelso No. Four. The road from the public square in the town of Benton to the residence of the late William Cox No. Five. The road from the fork of the road on the top of the hill west of Benton to

the residence of the late Alexander Montgomery's No. Six. The road from the public square in the town of Benton to the line dividing townships Moreland and Commerce on the Isaac Hunter lane shall be known as District No. One. The road from the lower end of Isaac Hunter's lane to the line dividing townships Moreland and Richland No. Two. The road from Carpenter's Ferry to the road leading from Benton to New Madrid District No. Three. The road from the public square in the town of Benton to the line dividing road to Commerce No. Seven. The road from the public square in the town of Benton to the line dividing townships Moreland and Sandy Woods on the road to Charleston No. Eight. The road from the public square in the town of Benton to the line dividing townships Richland and Moreland on the road to New Madrid No. Nine. The road from the forks of the road near the Hunter farm to Carpenter's Ferry No. Ten. The road from the forks of the road near the Gum Swamp to Mrs. Norman's branch No. Eleven. The road from Mrs. Norman's branch to the County line dividing Scott and Cape Girardeau — on the road to Jackson No. Twelve. The road from the Catholic church to the forks of the road near the residence of Frederick Oupman's No. Thirteen. The road from the town of Commerce to the Cypress Creek No. Fourteen. The road from the Cypress Creek to the end of the Levee No. Fifteen. The road from the end of the Levee to the line dividing townships Moreland and Kelso No. Sixteen. The road from Manning's Landing to the forks of the road near the residence of Paschal E. Ancell's No. Seventeen. The road from the river bank in the town of Commerce to the line dividing townships Moreland and Commerce and to include also the road from the forks of the road near the Wellbron place to Charles Moore's No. Eighteen. The road leading from the town of Commerce to the township line dividing townships Commerce and Tywappity No. Nineteen. The road leading from the township line dividing townships Tywappity and Commerce to the line dividing Counties of Scott and Mississippi No. Twenty. The road leading
24 from the forks of the road near the William E. Sled's — to the township line dividing townships Sandy Woods and Tywappity No. Twenty-one. The road from Price's Landing to the county line near the residence of Francis Brown's No. Twenty-two. The road from the county line near the Schnitger's place to the forks of the road near the residence of James C. Crenshaw No. Twenty-three. The road from the line dividing townships Moreland and Sandy Woods to the line dividing townships of Sandy Woods and Tywappity No. Twenty-four. The road from the Hunter's lake to the forks of the road near the residence of Ephram Lemley's No. Twenty-five. The road from the top of the ridge west of the town of Benton at the forks of the road to edge of the Big Swamp near the residence of John Friend's No. Twenty-six. The road from the town of Hamburg to where the same intersects with a road leading from Benton to the town of Commerce No. Twenty-seven."

Appellant withdraws objection to last order.

Relator next offers in evidence a certified copy of an order of the

County Court of Scott County entered of record on the 29th of April, 1856, marked Exhibit "S," as follows:

"Ordered by the Court that Alexander S. Henderson be appointed Commissioner to superintend the repairing of a bridge on the road leading from Benton to Jackson near the residence of Felix G. Allen's and that the expense thereof be paid out of the Road and Canal fund."

Respondent withdraws objection to above order.

Relator next offers in evidence a certified copy of an order of the County Court of Scott County entered of record on the 20th of April, 1857, marked Exhibit "T," as follows:

"Ordered that Miles M. Taylor be appointed overseer on road district No. 15, leading from Charles Moore's in Kelso township to the Toll Gate at the Macadamized levee."

Appellant withdraws objection to last order.

Relator next offers the deposition of Jesse J. Miller, marked Exhibit "U."

JESSE J. MILLER, of lawful age, being produced, sworn and examined on the part of plaintiff, deposeth and saith:

Examination by Mr. M. A. DEMPSEY:

Q. State your name?
A. J. J. Miller.
Q. Where do you live?
A. In Scott county, Mo.
Q. How long have you lived in this County?
A. Going on twenty-one years.
Q. How long have you lived in this vicinity?
A. Twenty years.
Q. How long have you lived in Southeast Missouri?
A. Sixty-nine years.

Q. Are you familiar with the road leading from Cape
25 Girardeau across the rock levee to Benton?
A. Yes, sir.

Q. How long have you known the rock road across the levee?
A. Since about the year 1840.
Q. What was its condition when you first knew it?
A. It was a pole road. Cross- with poles.
Q. Was there any toll gates on it at that time?
A. No, sir.
Q. Do you remember when the toll gates were first put upon that road?

Objected to by Counsel for defendant.

A. Don't remember the date.
Q. At the time the toll gates were put up, what changes, if any, had been made in the condition of the road?
A. They bedded it up with dirt and then put rock upon it.
Q. Where does that road known as the rock levee road begin and end?

A. Commences at the edge of the swamp near the hills and ends on the other side of the swamp near the hills.

Q. About how long is it?

A. About three miles.

Q. In 1840, 1850 and 1860 was there any other roads leading across that swamp connecting Cape Girardeau and Benton?

A. Evidently there was a road that went through the swamp between the rock levee and river, and came out near about where a man by the name of Dobbs lived where the R. R. now crosses.

Q. Was that a public road?

A. No, sir.

Q. When you first knew the road from Benton leading across the rock levee to the Cape what was the route from the upper end of the rock levee to the Cape?

Objected to by Counsel for defendant because no foundation has been laid.

A. It went due north through what was at that time known as the English farm, then east to the south side of the Cross farm, and at the lane the roads forked, both went to the Cape. The oldest road from the fork went north through the Cross farm about one mile and then turned east, and went eastward by a place that was owned by Cross—in an eastward direction nearly to the Cape striking the present Scott County road at the Moses McLain farm, which is now in the city limits of Cape Girardeau. The other road went on the south side of the Cross farm, and on the south side of the Hutchinson place and struck the old road at Cape La Croix Creek.

Q. These roads beginning at the end of the rock levee ran on the west side of the Bluff, did they not?

A. Yes, sir.

Q. When, as nearly as you remember, was the road made that runs on the east side of that Bluff?

A. I don't know. I can not tell exactly. About twenty-five or thirty years ago.

Q. When were the toll gates put upon this road, was it before the War?

A. I don't remember.

26 Q. Was the old road which you have described as leading across the rock levee in 1840, the same road now known as the rock levee road, upon which the Scott County Macadamized Road Company had its toll gate?

Objected to by counsel for defendant, no foundation has been laid.

A. That portion across the swamp that the toll gate is on was the same; that part from the north end of the rock levee was not.

Q. About how often between 1840 and 1860 did you travel along these roads from the Cape across the Swamp?

A. About once a week.

Q. Did you ever work these roads?

Objected to because too general.

A. A portion of them.
Q. When?
A. I was appointed road overseer when I was 18 years old by Cape Girardeau County, and worked on a portion of these roads. I was road overseer about fifteen years.

Cross-examination by Mr. RANNEY:

Q. How old are you, Uncle Jesse?
A. Was 69 years old yesterday.
Q. Where were you born?
A. In Cape Girardeau County, Missouri, four miles west of Cape Girardeau, on what is known as the Peter Byrne farm.
Q. How long did you live there?
A. Eight years.
Q. How far is that from the north end of what is known as the rock levee?
A. A little over two miles.
Q. Where did you then move to?
A. About two miles due east towards Cape Girardeau.
Q. How long did you live there?
A. Lived there until 1857, with my father.
Q. How far is that place from the north end of the rock levee?
A. About four miles and a half.
Q. Where were you living at the time you were first appointed road overseer?
A. I was living with my father on that same place where we moved to from the Byrns' place?
Q. How long did you serve as road overseer, when you were first appointed?
A. I don't recollect.
Q. How old were you, if you remember, when the rock road was built by the Company?
A. I guess I was about grown at that time.
Q. In what year was you born?
A. 1834.
Q. Now as a matter of fact when you moved to Scott County, you were very familiar with the country through which this rock road was built, were you not?
A. Yes, sir, I knew that country.
Q. You may state what kind of a country it was at that time?
A. It was a swampy, wet country, about three miles wide.
27 Q. How many roads at the time that rock road was built had been cut out across that swamp to Scott County?
A. I could not tell, there had been several.
Q. The country was covered with timber, was it not?
A. Yes, sir.
Q. At that time no farms had been opened up in the swamp?
A. I know of one small farm, old Uncle Andy Giboney had that.
Q. Was there a road running by that farm?
A. I think there was, such a road as it was. You could not follow them roads after the leaves fell. I did not know of any County roads;

did not know of but one road that was ever started for a County road, and don't know whether or not, it was ever completed.

Q. Were any of these roads in a condition to travel until the rock road was built?

A. Only in dry seasons.

Q. Was it not a fact at that time, everybody thought he had a right to blaze out a road across the swamp wherever he pleased?

A. Could not tell you what they thought; they did do it.

Q. Did not they go across the swamp in all directions?

A. Yes, sir, when they could.

Q. Did you work on the rock levee road when they were building it?

A. No, sir.

Q. Do you remember when it was built?

A. I know when it was built, but don't remember the date.

Q. You were present while it was being constructed?

A. Yes, sir, I passed there while Lansman was at work at it.

Q. Did the old road that you spoke of start into the swamp at both ends exactly where the rock levee road does now?

A. I could not say it was precisely the same ground.

Q. Are you prepared to swear that the rock levee road was built or constructed exactly on the old road that you speak of?

A. I would not like to swear that it covered precisely the same ground; but my best recollection is it covers the same old road bed, and some outside, the old road was narrower than the present road.

Q. Did the old road run straight?

A. I think so, you could see across it.

Q. How wide was that old road?

A. Well, I have seen it when it was not more than 8 or 9 feet wide, bushes growed up on each side of it, some places they lapped.

Q. At the time the Cape Girardeau and Scott County Macadamized Road Company took possession of that road, if they did so, did you hear any objections or protests on the part of anybody?

A. I don't remember that I did.

Q. Well, you were living in the neighborhood all the time, were you not?

A. Yes, sir.

Q. Do you remember when Dr. Brown lived across the swamp?

A. Yes, sir.

28 Q. Do you remember a stone spring house that he had built?

A. Yes, sir.

Q. With reference to that spring house where was Dr. Brown's house located?

A. It was south.

Q. On which side of the spring house was the old road before the rock road was built?

A. On the south and east.

Q. The old road was on what side of the house?

A. On the south.

Q. How far was the house from where you made the turn to go across the swamp?

A. Some 30 or 40 feet.

Q. You remember that the stone spring house was built before the rock road?

A. I think it was.

Q. The old road turned north across the swamp 30 or 40 feet from the house, did it not?

A. Yes, sir.

Q. Do you remember a road that left this old road that you speak of running in a northwest direction through the Kelso place, and northwardly through the Simeon English farm?

A. Yes, sir.

Q. How far did that road strike the hills from the other old road across the swamp?

A. I don't know, suppose about a mile and a half.

Q. What became of these old roads leading from the north end of the rock levee to the City of Cape Girardeau after the rock levee was built?

A. Part of them was changed and part of them was fenced up.

Q. I'll get you to state whether they were not abandoned by the public?

A. A part of them was changed, and some of them fenced up, and some abandoned.

Q. Don't you know as a matter of fact that the old road leading from the north end of the rock levee to the City of Cape Girardeau has been abandoned for more than 20 years?

A. Yes, sir, I do.

Q. Don't you know as a matter of fact that a new County road was regularly and formerly opened by petition to the County Court, leading from the north end of the rock levee in a northerly direction to the City of Cape Girardeau, since the construction of the rock levee road?

A. Yes, sir, I was road overseer at the time it was done.

Redirect examination by Mr. DEMPSEY:

Q. You spoke of several roads running across the swamp before the rock road was built, were any of those roads constructed or improved roads, except the rock road?

A. One road, I have worked a portion of it, but in a general
29 way nothing but trails. Every man had his own road.

Q. Before the rock levee road was constructed of rock what was the main road across the swamp?

A. The Corduroy.

Q. When you first knew the Corduroy road, was it an old or new road?

A. It was an old road I suppose; it had poles across it and dirt thrown on it.

Q. When you first knew the road what was it called?

A. I think it was called the levee.

Q. The old road across the swamp that you mentioned on direct examination struck the hills east of the present road?

A. Yes, sir.

Q. About how far east?
A. About one and one-half miles.
Q. Was it an improved road?
A. No, sir.
Q. There was a road in 1840 from Benton connecting with the south end of the rock levee and there has been ever since?
A. Yes, sir.

Recross examination:

Q. Was that road that you speak of located now in the same place that it was in 1840?
A. No, sir.
Q. Do you know how the change has been made?
A. No, sir, I only know that it has been made.
Q. Do you know who threw up the levee across the swamp?
A. No, sir.
Q. Did you see anybody working there?
A. No, sir, was quite a boy then.
Q. Was it thrown up as much then as it is now?
A. No, sir, in my recollection it was only about six inches thrown up.
Q. In your judgment, how high is it now?
A. About 18 inches.
Q. Was it corduroyed all the way across?
A. I think it was across the main swamp and close to Dr. Brown's house.

Redirect examination:

Q. There was a road beginning at the north end of the rock levee going up on top of the bluff and leading to the Cape?
A. Yes, sir, a private road.
Q. Was it used by the public?
A. Yes, sir.
Q. When was it used as a road?
A. About 50 years ago.

[SEAL.] (Signed) J. J. MILLER.

Mr. RANNEY: We desire to offer the same objection to that deposition that has been made to these orders, the proper foundation has not been laid; if they are offered for the purpose of showing that this was a county road where the road of this company has been built we object to it, because the proper foundation hasn't been laid; because there was a general law at that time providing the manner in which county roads may be established and of course that it is not the best evidence.

30 By the COURT: Let the objection be overruled.

To which ruling of the court the respondent objected and excepted at the time.

Mr. SMITH: We move the exclusion of this deposition for the reason that there is no identification of the road mentioned in the

deposition with the Scott County Macadamized Road; and there seems to have been several roads wandering over the Big Swamp.

Same ruling of the court and same objection.

Relator next offers in evidence deposition of James F. Allen, marked Exhibit "V."

JAMES F. ALLEN being produced and duly sworn, and examined on part of plaintiff, deposeth and saith:

Examination by Mr. M. A. DEMPSEY:

Q. State your name and residence.

A. James F. Allen, Oran, Mo.

Q. How long have you lived in Scott County?

A. I was born here. Am 67 years old, and have lived here all my life with the exception of 8 or 10 years.

Q. How far back do you remember the road now known as the rock levee road upon which the Scott County Macadamized Road Company has a toll gate?

A. Since 1850.

Q. Were there any toll gates on that road at that time?

A. No, sir.

Q. What kind of a road was it then?

A. Poles laid down and dirt thrown upon either side.

Q. About how long afterwards were the toll gates established?

A. The rock was put on the road, I think, about 1857.

Q. In 1850 and thereafter, what was the main public road used between Benton and Cape Girardeau across the swamp?

A. Across that levee road; that is, until after the War, when another road was built running east of the rock levee, along the Bluff.

Q. From 1850 to 1860, about how often did you travel across the rock levee road?

A. About 1851 and 1852, about 2 or 3 times a year, later about twice a year.

Q. Is the road known as the rock levee upon which the Scott County Macadamized Road Co. has a toll gate, the same road that you knew in 1850?

A. I think it is, during August and September, 1856, I was at the Cape every few days and I saw the poles thrown out to the side of the road. They were then constructing the rock road.

Cross-examination by Mr. RANNEY:

Q. Do you know of any other roads besides the one you traveled over at the time you mentioned?

A. No, sir, but could see where the wagons had gone.

Q. Did you notice the poles thrown out all the way across?

31 A. No, sir, I could not see them all the way along, only in some places.

Q. You are not positive that the rock road was constructed all the way along on the road that you traveled?

A. No, sir, it started about the same place and came out at the

same place, to the best of my knowledge, it is built about the same place.

Q. Are you positive that the old road started in across the swamp and came out on the other side exactly in the same places?

A. To the best of my knowledge.

Q. Are you willing to swear that the rock road is exactly on the old road that you spoke of?

A. I think it is from traveling over the road, the timber was cut. I didn't see that any more timber had been cut after the rock road was built, I couldn't say positive all the way, but I think it is.

Q. Who built that road?

A. Don't know—heard that a company built the rock road—don't know who built the corduroy road. It was an old road when I knew it.

Q. Where were you living when the rock road was built?

A. Near Benton.

Q. I understood you to say that in August and September, 1856, you frequently went to the Cape over this road. Did you then see any work being done?

A. As I said before, I saw poles on the side of the road at different places and think I saw men at work on it.

Q. Do you know who threw those poles to the side?

A. Don't know.

Q. Do you know who they worked for?

A. Only from supposition. I suppose they were working for that company and I saw it mentioned in the Cape papers.

Q. Do you remember when the company first proposed to build that road?

A. I do not remember the exact date.

Q. Do you remember of hearing of any objections or protests on the part of any body to the company occupying the old road?

A. None whatever—they seemed to be anxious for it.

Q. How wide was the old road?

A. I can't tell—may have been 12 or 14 feet.

Q. How wide is the present road?

A. Don't know—wagons pass on it.

Q. After you got to the north end of the swamp, how did you go to the Cape?

A. We went 50 or 100 yards northwest, then turned eastwardly and went up the hill, went along on top of the ridge in a northeasterly direction to Cape La Croix Creek, crossing the Creek near Cross's negro cabins by a ford, thence in a northerly direction by the Beaudean house to the old fair grounds, leaving Dr. Brown's residence to the right. Then, sometimes with a heavy load, we went still further from the end of the rock levee and then turned and went north.

Q. About how far west of the present rock road is Beaudean's house?

A. About a half a mile.

Q. When was the last time you went by the hill road?

A. Before the War.

Q. Do you know of the hill road being worked as a county road?

A. Don't know.

Q. Don't you know as a matter of fact that the road across the hill was abandoned prior to the building of the extension of the rock road to the Cape?

A. I think it was.

Q. And this other road was still further west?

A. Yes.

Q. You don't know anything about the construction of the old road?

A. No, only from hearsay, never worked on it.

Q. Do you know whether this road was called the levee road in 1850?

A. Can't say positively.

Redirect examination.

(By Mr. DEMPSEY:)

Q. Do you remember what it was designated or called?

A. Can't say positively, but my impressions is that it was called the levee road.

[SEAL.] (Signed) JAMES F. ALLEN.

Mr. SMITH: We desire to object to the reading of this deposition for the reason that it fails to show that any road was lawfully established across the swamp, the deposition seeks simply to show that some kind of a road fifty years ago crossed the Big Swamp and fails to make any connection with the road in question now, that is, with the Scott County road.

Objection overruled.

To which ruling of the court, respondent objected and excepted at the time.

Mr. SMITH: I object to what the witness, Allen, thinks in his deposition in his answer just before the Cross-Examination.

By the COURT: I will permit it to be read; as to what he thinks, that standing alone won't be considered testimony.

Relator next offers in evidence the deposition of Simeon R. Jones, marked Exhibit "W."

SIMEON R. JONES, of lawful age, being produced, sworn and examined on part of plaintiff, deposeth and saith:

Examination by Mr. DEMPSEY:

Q. State your name and residence.

A. Simeon R. Jones, Commerce, Scott County, Mo.

Q. How long have you lived in Scott County?

A. Over 50 years.

Q. Did you know the road now known as the rock levee road before there was any toll gate on it?

A. Yes, sir.

Q. What condition was it in?

A. Most of it pretty bad, for the most part a corduroy road.

Q. Does the present rock levee road upon which the Scott County

Macadamized Road Company has a toll gate, follow the line
33 of the old road?

A. Almost entirely.

Q. Can you state definitely where and to what extent it deviates?

A. A small portion of the end at this side and for a short distance near the other side of the swamp.

Q. With those exceptions is the line the same?

A. Yes, sir, the same.

Q. Altogether about how long is the part of the road that deviates?

A. Perhaps a quarter of a mile.

Q. How was the road called or known when it was a corduroy road?

A. It was called the Big Swamp Levee.

Q. How many years, about, did you know this road before the toll gates were established?

A. As I remember it was 7 years.

Q. Where were the toll gates first put up?

A. At this end of the levee (south).

Q. How often were you in the habit of using this old road?

A. Ten to twenty times a year.

Q. What was the main or public road across the swamp at that time?

A. That was the principal traveled road across the swamp at that time.

Q. Was it a public highway?

A. I don't know that it was in the sense that you ask it. I don't know that it was ever ordered opened; it was traveled by the public without any charge.

Q. Do you know of any repairs being made on the old corduroy road?

A. I have seen where it had been repaired, but did not see the repairing done.

Q. When you first knew it, was it a new or an old road?

A. I am not able to tell how old it was.

Q. From its appearance could you tell whether it had been recently constructed?

A. It looked like an old road.

Q. What was the route to the Cape from the levee road, from the north end of the levee?

A. When I first knew it, which was about 1847, the road ran in a northwesterly direction, a short distance then turned northeastward over a long ridge. It struck Cape La Croix Creek about one mile from the levee at the lower Cross farm, and thence to the left of the old Giboney farm to the Cape. Years afterward, about 1853 and 1854 we turned from the north end of the Swamp levee, and traveled south of the rock bluff about half a mile, then turned to the left up this same long ridge into the ridge road, and proceeded on to the Cape by the Cross farm, the first named route.

Q. On leaving the levee then, did you follow the line of the present road for that half mile?

A. I could not say. Am not familiar with the present road there

to explain. I haven't been familiar with those roads since 1862.

34 Q. Did you go to the left or the right of the bluff?

A. Went to the right of the bluff.

Cross-examination by Mr. RANNEY:

Q. How old are you, Judge?

A. I am 65 years old.

Q. Where were you living at the time you got acquainted with the road across the swamp?

A. I first crossed it in 1847, to where my father settled 1 mile west of Kelso in Scott County.

Q. About how far from the south end of the swamp levee road, as you knew it, was that?

A. Three and one-half miles.

Q. Do you remember when the Cape Girardeau and Scott County Macadamized Road Company began to build its road?

A. As I remember in 1854.

Q. About one-half the road was located in Scott County, was it not?

A. About, that was my understanding.

Q. Did you at that time hear of any objections or protests to the Company occupying this old swamp road or swamp levee?

A. I have no distinct recollection of any.

Q. Do you know whether these roads up over the hill from the north end of the levee were abandoned prior to 1862?

A. I don't know that they was, from the fact that I never traveled any other road to Cape Girardeau.

Q. There was another road east of the swamp levee road, was there not?

A. Yes, sir, only passable in the fall season.

Q. Did you know of any other road across the swamp except the one you have mentioned?

A. Yes, one from the Ranger spring to the Renfroe farm in Cape Girardeau County.

Q. Do you, of your own knowledge, know whether any of those roads were worked by the County?

A. No, sir, not of my own knowledge.

By Mr. HOUCK:

Q. Where does the present Cape Girardeau and Scott County Macadamized road deviate from the old road?

A. From this end, if any, or I should say the south end.

Q. What is the difference in the route of the present road and the old road?

A. If any, the deviation would be very slight.

Q. Was the old road east or west of the present road at the south end?

A. I would say West.

Q. How far west?

A. I am not able to state.

Q. On the further or north side of swamp, was there any deviation, if so, how great?

A. Don't think there was any.

Q. Was the remainder of the road from the south to the north end straight in 1847, as it is now?

A. That is my recollection.

Q. When did you first go over the road?

A. In 1847, or rather came over it.

35 Q. How old were you then?

A. Nine years old.

Q. Did the road have poles on it then?

A. It did, poles and rails.

Q. Who put those poles there?

A. Do not know.

Q. Was the road flat, or was there embankments?

A. Slight embankments in places.

Q. How high was the grade of the road, about?

A. Six inches in some places.

Q. Were there any ditches on the sides?

A. In places.

Q. At what places?

A. Near the middle.

Q. Were there any roads leading off from this road in the direction of Cape Girardeau?

A. There was one, a little beyond the center of the swamp.

Q. Was not the main public road along the bluff in Scott County to Cape La Croix Creek, and along Cape La Croix Creek to Cape Girardeau?

A. I don't know that it was a public road, but I traveled it.

Q. Was this before 1850 that you traveled it?

A. No, sir, it was in 1854 or 1855.

Q. Was there such a road along the Bluff in Scott County, and along Cape La Croix Creek to Cape Girardeau in 1850?

A. I knew of no such road at that time.

Q. You don't swear that there was no such road at that time?

A. Of course, I could not.

Q. In 1854 or 1855, when you passed along this road, was it an old or new road?

A. Most of it seemed to be new.

Q. What was its condition as compared with swamp roads generally?

A. Its condition was the same as swamp roads generally. In winter time couldn't be traveled at all.

Q. What was its condition as compared with so-called levee roads at the same season of the year, *which* you traveled it?

A. The difference was very slight.

Q. The character of the Big Swamp at that time was about the same as it is at present?

A. Yes, sir.

Q. The character then of this road was about the same as the present Commerce road along Cape La Croix Creek?

A. Just about the same.

Q. It was about as good a road as the present road, was it not?
A. About as good.
Q. Were there any other roads except this road that you have mentioned leading off from the so-called swamp levee road, and the road along the Scott County hills and Cape La Croix Creek?
A. There were no others known to me.
36 Q. Did you ever travel the road leading off from the swamp levee road about the middle of the swamp, if so, when?
A. I never traveled it.
Q. How many times did you pass along the swamp levee road in 1847?
A. Only once.
Q. When was the next time that you passed along this road?
A. I think in 1851.
Q. You passed along that road twice, only, before 1852?
A. As well as I remember.
Q. Is it not probable that there was a road across the swamp that you passed without seeing?
A. Very probable that there were other roads that I did not notice.
Q. Did the swamp levee road have a right of way, or was there a mere road way with trees and bushes growing along the side?
A. This swamp levee road appeared to have been cut out about 60 feet wide all the way, all the timber having been cut off.
Q. Do you swear that it looked 60 feet wide 50 years ago, when you first saw it?
A. Yes, sir, that's the way it appeared to me then.
Q. Did the right of way appear to be growing up then?
A. In some places.
Q. In the places where the right of way was not growing, did the bushes appear to have been cut off or drowned out?
A. I did not notice.
Q. Did the right of way and road appear in a deserted and neglected condition?
A. Outside of the ditches, it did.

Redirect examination:

Q. Was the Renfro's road an improved road?
A. No, sir.
Q. Was the Cape La Croix road an improved road?
A. No, sir, not when I saw it.
Q. Was the road branching from the middle of the levee an improved road?
A. No, sir.
Q. Was the old corduroy road passable during most of the year?
A. It was during most of the year, but was at times almost impassable.
Q. Was there much travel over this levee road in the early fifties?
A. There was considerable.

Recross examination:

Q. How considerable?
A. At times during the fall of the year, as many as 20 moving wagons could be seen traveling the road.

Q. The travel then of the road was mostly by emigrants or movers raveling West?

A. It was quite considerable.

Redirect examination:

37 Q. How was this road known in 1850 and prior thereto?

A. It was called a State road by parties, at times, whom I conversed with. Those parties were old residents of this section. General Watkins and others.

(Signed) SIMEON R. JONES.

Mr. SMITH: Same objection to this deposition as to two last and he same ruling, to which ruling respondent objected and excepted at he time.

It is admitted by counsel for relator and respondent that at the time of the institution of this suit and since February 24th, 1903, appellant has been maintaining toll gates on the road described in the pleadings and has collected toll thereat.

T. D. HINES, of lawful age, being produced, sworn and examined on behalf of Relator, on his oath deposes and saieth:

Examined by Judge BURROUGHS:

Q. At the time of the filing of this suit what office did you hold n Cape Girardeau County?

Mr. SMITH: We object to this testimony because there is no allegation in the petition to base this testimony on; no allegation that he was Prosecuting Attorney of Cape Girardeau County or that this is n official prosecution.

By the COURT: Proceed. I will hear the testimony; it occurs to ne that there was no allegation to that effect.

To which ruling of the court respondent objected and excepted at he time.

Judge BURROUGHS: We will ask leave to amend.

A. I was Prosecuting Attorney.

Q. This suit is brought at your relation and in your official capacity?

A. It was.

Judge BURROUGHS: We ask leave to amend the petition by inserting at the beginning thereof the allegation that T. D. Hines was at he time of the filing of this suit Prosecuting Attorney of Cape Girardeau County and brings this suit in his official capacity.

Mr. SMITH: This is a very material allegation and we object to hat now being made when on trial.

By the COURT: I think that it can be made; I think it is only roper to permit that amendment to be made; it need not necessarily elay this case in any way that I can see.

Mr. SMITH: We except. This allegation is very material in this ase and relator cannot recover in this case, as the petition now stands, hat being the case relator is not entitled to make the amendment.

By the COURT: I will permit the amendment now; of course, if the Court has committed error in permitting the amendment, it will correct it.

To which ruling of the court appellant objected and excepted at the time.

Relator rests.

Mr. SMITH: We now renew our demurrer to the evidence and state that under the testimony and pleadings in this case the plaintiff is not entitled to recover.

38 By the COURT: The demurrer will be overruled; this is an equity case and it is rather unusual to consider a demurrer in that class of cases at this time.

To such ruling of the court, respondent objected and excepted at the time.

Mr. SMITH: We offer the Acts of 1853 at page 337, approved February 24th, 1853, marked Exhibit 1, as follows:

"Be it Enacted by the General Assembly of the State of Missouri, as follows:

1. That James Cannon, Wilson Brown, Nathaniel W. Watkins, Thomas Johnson, Abraham Hunter, Peter Byrne and Amasa Alton, and each other person as they may associate with them, and their successors, be and are hereby created a body politic and corporate, by the name and style of the Cape Girardeau and Scott County Macadamized Road Company, with a capital stock of fifteen thousand dollars, to be divided into shares of fifty dollars each; and may and shall have *perpetual succession* as such, and may make and use a common seal, and the same to alter at pleasure.

2. The said company shall have the exclusive *privilege of constructing a macadamized road across the big swamp*, in the counties of Cape Girardeau and Scott, where said swamp commences, below the city of Cape Girardeau, and running across said swamp, a distance of three or four miles, with the *privilege of extending the same to the city of Cape Girardeau;* said road to be located on what is called the levy, or between the levy and the Mississippi river.

3. Said road shall be constructed with a double or single tract (track) as the company may select: provided, that if constructed with a single tract (track) only suitable and convenient turnouts or places for wagons shall be provided at intervals of not more than fifty rods.

4. The affairs of said company shall be managed by a board of five directors, elected bi-ennially, one of whom shall be appointed president, and said directors shall be elected by the stockholders, each share of stock entitling the holder to one vote; and said board shall have full power to adopt all by-laws and regulations necessary for the management of the affairs of the company, and for the appointment of any other officers and agents of the company that may be necessary: provided, that no such by-law or regulation shall be repugnant to the laws and constitution of this state.

5. The county court of the counties of Cape Girardeau and Scott are authorized to invest any of the funds of said counties in the stock of said company, and may appoint a suitable agent or agents to

attend to the interests of said counties in said company, and to vote at all elections of officers of the company.

6. The stock of said company shall be deemed and held as personal property, and shall be exempt from all taxes for state or county purposes.

7. The company may erect suitable toll gates, and charge toll for passing over said road, not to exceed the following rates for the whole distance, to-wit: For each wagon or vehicle drawn by six
39 animals, sixty-five cents; for each wagon or vehicle drawn by four animals, fifty cents; for each wagon drawn by two animals, thirty-five cents; and for each wagon or cart drawn by one animal, twenty cents; for a man and horse, ten cents; each pleasure carriage drawn by two horses, forty cents; each pleasure carriage drawn by one horse, twenty cents; for each foot passenger, five cents; for sheep, hogs, yearling cattle, each one cent; for other cattle, mules or horses, each five cents.

8. The privileges granted in this charter shall continue for fifty years: provided, that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road.

9. The corporation (corporators) named in this act, or a majority of them, may meet at such time and place, and upon such notice as they may select and agree upon, and organize as a board of directors, make such regulations as they may deem proper, for the opening of books for the subscription of stock; and as soon as three thousand dollars is subscribed, shall call a meeting of the stockholders for the election of a permanent board of directors, which board shall hold their offices for two years and until their successors are duly elected and qualified.

This act to take effect and be in force from and after its passage. Approved February 24, 1853."

Defendant next offers articles of association or incorporation of the Scott County Macadamized Road Company dated May 26th, 1903, marked Exhibit 2, duly certified by Secretary of State, as follows:

"Be it known, that the undersigned have formed themselves into a corporation for the purpose of constructing and owning a macadamized and gravel road under Article 5, Chapter 12, of the Revised Statutes of Missouri, 1899, and for this purpose have signed the following Articles of Association:

First. The name of this corporation shall be the Scott County Macadamized Road Company.

Second. The said road shall begin at the southern city limits of the city of Cape Girardeau, and where Sprigg street terminates and extend thence in a westerly and southerly direction through Surveys No. 2199, No. 2202, No. 812, and No. 2919, and thence through sections 24 and 25, Township 30, North, Range 13 east, in the county of Cape Girardeau, State of Missouri, and through sections 30 and 31, Township 30, North, Range 14 East, and thence through Survey No. 2191, and sections 6 and 7, in Township 29, North, Range 14,

East, in the county of Scott, State of Missouri, to a point on the town limits of the town of Kelso, in Scott county, Missouri, and said particular point where said road will join the said town limits to be more particularly fixed in said section 7 by actual survey, and the same macadamized road shall and to be ten (10) miles long.

Third. The capital stock of the said company shall be fifteen thousand dollars ($15,000.00), divided into three hundred (300) shares of fifty dollars ($50) each.

Fourth. The names of the subscribers of the capital stock of the said company, and the residences of the said subscribers and the amount of capital stock subscribed by each of the subscribers are as follows:

Giboney Houck, of Cape Girardeau, Mo., 196 shares.
Edward F. Blomeyer, of Cape Girardeau, Mo., 1 share.
Robert G. Ranney, of Cape Girardeau, Mo., 1 share.
Malcomb Brown Nesmith, of Scott County, Mo., 1 share.
Rollin B. Andrews, of Cape Girardeau, Mo., 1 share.

Fifth. This company shall continue and exist for a period of fifty (50) years from the date of these Articles of Incorporation.

Sixth. The principal place of business of said company shall be located in the City of Cape Girardeau, Missouri, and the principal office shall be located at Cape Girdeau, Missouri.

Seventh. The Board of Directors of said company shall be composed of five stockholders and the first Board of Directors are to be:

Giboney Houck,
Edward F. Blomeyer,
Robert G. Ranney,
Malcomb B. Nesmith,
Rollin B. Andrews,

And to whom five per cent. (5 per cent.) of the amount of the capital stock subscribed by the subscribers to these articles has been paid in good faith and in cash thereon and which amount of stock subscribed amounts to one thousand dollars ($1,000.00) per mile of the said road so contemplated to be constructed and owned, and the name of its authorized agents shall be said above named directors at Cape Girardeau, Missouri.

In Witness Whereof, we have hereunto subscribed our names and places of residence and the number of shares of stock we agree to take in the said company:

Names.	Place of Residence.	Number of Shares.
Giboney Houck		196 shares.
Edward F. Blomeyer		1 shares.
R. G. Ranney		1 shares.
Malcomb B. Nesmith		1 shares.
Rollin B. Andrews		1 shares.

STATE OF MISSOURI, *County of Cape Girardeau, ss:*

Edward F. Blomeyer, Robert G. Ranney, and Rollin B. Andrews, being three of the above directors named in the Articles of Incorporation of the said Scott County Macadamized Road Company, as

above, being duly sworn, upon oath, state that the stock in the said Macadamized Road Company to the amount of ten thousand dollars ($10,000.00) being one thousand dollars ($1,000.00) of stock for each and every mile of macadamized road proposed to be made, constructed and owned, has in good faith by said subscribers been subscribed thereto, and that five per cent. (5 per cent.) thereon has been paid in good faith and in cash to the Board of Directors named in the said Articles of Incorporation, and that it is intended in good faith to construct, maintain and own a macadamized road mentioned in the Articles of Association attached hereto.

In Witness Whereof, we have hereunto set our hands this
41 the 28th day of May, A. D. 1903.

EDWARD F. BLOMEYER.
R. G. RANNEY.
ROLLIN B. ANDREWS."

Subscribed and sworn to.

N. C. FRISSELL, of lawful age, being produced, sworn and examined on behalf of Respondent, on his oath deposeth and saith:

Direct examination by Mr. SMITH:

Q. State your name, residence and business?
A. My name is N. C. Frissell, residence Cape Girardeau, business surveyor.
Q. How long have you been surveyor?
A. Since about 1870.
Q. You have been County Surveyor of Cape Girardeau County?
A. Yes, sir, I am now.
Q. You may examine this plat and tell the Court if it is correct and who made it. (Counsel here handing witness plat.)
A. This is a plat showing location of the Scott County Macadamized Road and I made it.

(By the COURT:)

Q. You made that survey?
A. Yes, sir, and plat.

(Mr. SMITH:)

Q. What line on this plat represents the road?
A. It begins on Sprigg Street; Cape Girardeau is up here; this is the city limits; the top of the map is North; here is the city limits; this is Sprigg Street; this is the south end of Sprigg street.
Q. You are now speaking with reference to the North terminus of this road, terminating at Cape Girardeau?
A. Yes, sir, the North terminus of this road is south here to Sprigg street.
Q. Tell the Court through whose property it passes now?

Objected to by Relator as immaterial.

A. In the first place Mr. Brighams', Louis Houck, Robert
42 Whitelaw, Ed. Hely, Killebrew, and property of St. Vincent's College, public school property, Louis Houck, J. Skelton, Louis Houck, Giboney Houck, Malcolm Nesmith.

(By the COURT:)

Q. This black line indicated on the map lies wholly in Cape Girardeau County?
A. No, sir.

(Mr. SMITH:)

Q. What is the length of that road, about, Mr. Frissell, the whole length of that road?
A. I don't know exactly; it is in the neighborhood of five miles.
Q. When did you make this survey?
A. About two weeks ago.
Q. This is the south terminus of the road?
A. Yes, sir.

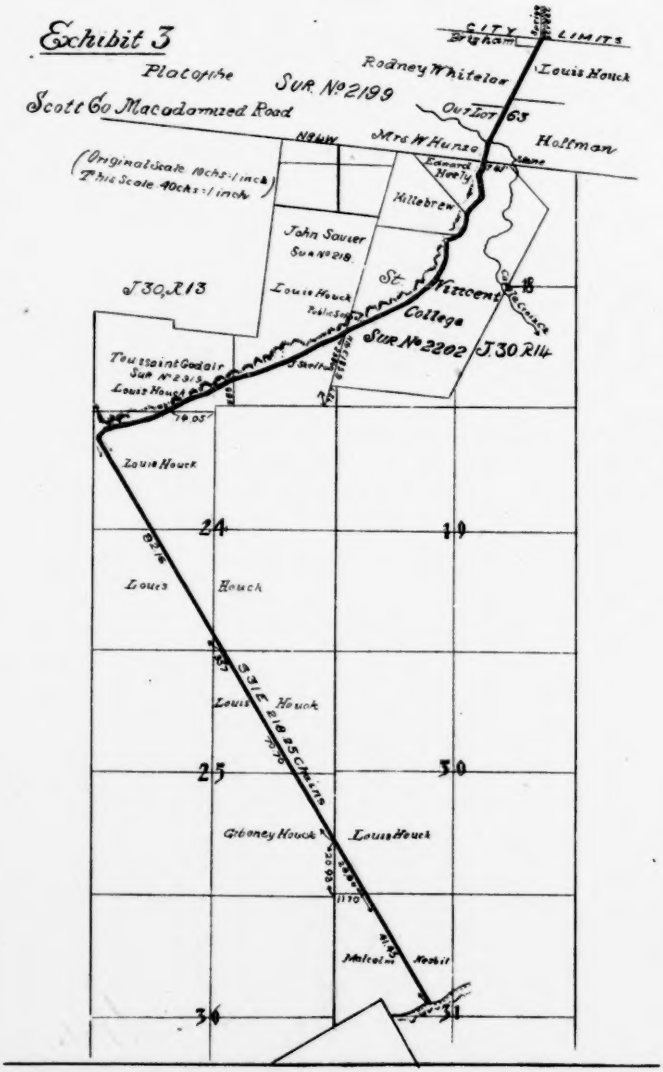
(By the COURT:)

Q. This is the road to Benton? (Indicating on map.)
A. No, sir, the Benton road goes out that way, that comes to the hills and stops.
Q. Show me, Mr. Frissell, where the county line is between Scott and Cape Girardeau Counties?
A. (Witness indicating.)
Q. Give the boundary lines between the counties?
A. It would be the center of section 25, quarter section line, red line.
Q. This is the boundary line between Scott and Cape Girardeau Counties to here, where this road crosses?
A. Yes, sir, this is the quarter section line running East and West through Section 25, Township 30, Range 13.

Cross-examination by Mr. DEMPSEY:

Q. How long is this rock levee within Scott County?
A. I guess about a mile, maybe a mile or more.
Q. Does Mr. Leming own any land on this road?
A. I think not, I don't think he owns a foot of it.
Q. Does this show the bluffs at the North end of what is properly called the rock levee?
A. This little black line indicates the road following along the East and South of the location of the bluffs.
Q. When the road leaves the bluff in Scott County what connection does it make with any public road?
43 A. The road that leads on toward Benton, I presume that is a public road.
Q. Do you know whether there is a public road that leads to the east?
A. I don't know whether it is a public road or not.
Q. Any gates or obstructions on that road leading to the north and east?

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v
Mo. exrel. Mines &c



A. No, sir, I didn't see any; I didn't go out that road at all.

(By the COURT:)

Q. Does this road pass by the city of Jackson?
A. No, sir.

(Mr. DEMPSEY:)

Q. From the north end of what is properly called the rock levee road, is there any direct connections with the road that leads to Jackson?

A. There is a road leading north or northeast that is called the Jackson Road.

Q. Down in Scott county you have heard it called the Benton and Scott Co. Road?
A. No, sir.

Mr. HOUCK: We object to any testimony in respect to the road leading from the north end of the road to Jackson as being irrelevant and incompetent and doesn't tend to establish any issue in the cause and is immaterial.

Objection overruled, to which action of the court appellant objected and excepted at the time.

Defendant now offers plat identified by N. C. Frissell and asks that it be marked Exhibit 3.

(See Exhibit "3" on Next Page.)

(Here follows diagram marked p. 44.)

(It is hereby agreed by and between the parties hereto that where any Acts of the General Assembly of Missouri are called for in the Bill of Exceptions in said cause, or, in the Abstract of Record in this case, the Acts themselves may be read in place of incorporating them in full in the Bill of Exceptions or in the Abstract of Record in this case.

R. L. WILSON AND
T. D. HIMES,
Attorneys for Respondent.
GIBONEY HOUCK,
M. R. SMITH, AND
R. G. RANNEY,
Attorneys for Appellant.)

Defendant next offers laws of the State of Missouri of 1825, page 688, sections 1, 2 and 3; these sections are descriptive of the procedure at that time on the location and establishment of public roads, and defendant offers to show that if any public road had been established across the Big Swamp at that time, there should have been some record of it in Cape Girardeau or Scott county or both counties, marked Exhibit 4.

Approved, January 18, 1814.

MR. DEMPSEY: We wish to save our exceptions.

We next offer the Chapter of the statute relating to the Location and Establishment of Public Roads, found in the statute of 1835, at page 546 and to page 553, marked Exhibit 5.

Approved, March 18th, 1835.

Relator objects to this on the ground that the court will take judicial notice of the general laws of Missouri.

Defendant next offers the statutes of 1845 relating to the same subject, pages 960 to 978, marked Exhibit 6,

Approved March 26, 1845.

Same objection by Relator.

Defendant next offers the Constitution of 1820, clause or section 7, on page 43, and clause or section 17, on page 45 of article 13 of the constitution as it appears in the laws of Missouri, 1845, marked Exhibit 7.

SEC. 7. That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay; and that no private property ought to be taken or applied to public use, without just compensa-
46 tion.

17. That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed, nor can the person of a debtor be imprisoned for debt after he shall have surrendered his property for the benefit of his creditors, in such manner as may be prescribed by law.

To which relator objects on the same ground.

Defendant next offers sections 7, 33 and 34 of an Act approved

February 27, 1851, found in the Sessions Acts of 1851, at page 260 to 265. Exhibit 8.

Approved February 27, 1851. To which relator objects on same ground.

Defendant next offers Section 1 of the Corporation laws as found in the Revised Statute of 1845 on page 231, also section 2, same page, marked Exhibit 9.

Be It Enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Every corporation, as such has power: *First*, To have succession by its corporate name for the period limited in its charter, and when no period is limited, for twenty years. *Second*, To sue and be sued, complain and defend, in any court of law of equity. *Third*, To make and use a common seal, and alter the same at pleasure. *Fourth*, To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. *Fifth*, To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation. *Sixth*, To make by-laws, not inconsistent with any existing law, for the management of its property, the

SEC. 2. The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated.

Approved March 19, 1845.

Same objection by Relator.

47 Defendant next offers a patent to swamp lands made by the governor of the state dated the 4th of November, 1871, from the State of Missouri to Cape Girardeau County, recorded in Cape Girardeau County in Book 4, pages 775 and 776, marked Exhibit 10.

No. 30.

The State of Missouri to all to whom these presents shall come, Greeting:

Whereas, By the act of the General Assembly of the State of Missouri, approved March 10, 1869, entitled "An Act in relation to Swamp and Overflowed Lands," it is provided that all the Swamp and Overflowed lands lying within the limits of the several counties of this State, which were granted, and have been patented to the State of Missouri by act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits," approved September 28, 1850, shall be conveyed to the different counties in the State of Missouri, in which such lands may lie; and

Whereas, The several tracts and parcels of land hereinafter described have been patented as Swamp and Overflowed lands by the Government of the United States, and are inuring to the State of

Missouri under the act aforesaid, being situate in the county of Cape Girardeau, in the State of Missouri, to-wit:

Township Thirty (30) North of Range Thirteen (13) East. The Southeast quarter of section Twenty-four (24), the North half of Section Twenty-five (25), according to the official plats of survey of said lands returned to the General Land Office by the Surveyor General.

Now therefore, Know Ye, That the State of Missouri, in consideration of the premises, and in conformity with the act of the General Assembly aforesaid, has given and granted, and by these presents does give and grant unto the said county of Cape Girardeau, in fee simple, subject to the disposal of the county court thereof and subject also to the various restrictions of law, the tracts of land
48 above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said county of Cape Girardeau, in fee simple, and to its assigns forever.

In Testimony Whereof, I, B. Gratz Brown, Governor of the State of Missouri, have caused these letters to be made patent, and the Great Seal of the State of Missouri to be hereunto affixed. Given under my hand at the City of Jefferson, this fourth day of November, in the year of our Lord One thousand eight hundred and seventy-one of the Independence of the United States the Ninety-sixth, of the State of Missouri the Fifty Second.

B. GRATZ BROWN.

By the Governor:
EUGENE F. WEIGEL,
Secretary of State.

Recorded Vol. III., pages 13 to 20 inclusive.

FRD. SALOMON,
Register of Lands.

To which patent Relator objects on the ground that same is wholly incompetent, irrelevant and immaterial in this case.

Mr. SMITH: The purpose is to show that the land therein described and over which this road passed belonged to the United States prior to 1850 and of course there could have been no public road established over it.

By the COURT: Does that patent have any tendency to establish that?

Mr. SMITH: Yes, sir.

Mr. DEMPSEY: The Court is not ruling on the objections made by either party at this time; I presume that the party taking the bill will be entitled to his exceptions.

By the COURT: I am trying to rule on these points as they are offered. I am admitting near'y everything now.

Objection overruled, and exceptions saved by Relator.

Defendant now offers a patent from the State of Missouri to the county of Scott, dated the 29th day of April, 1870, and recorded in the county of Scott in Book 19, page 122, marked Exhibit 11.

49 The State of Missouri to all to whom these presents shall come, Greeting:

Whereas, By the act of the General Assembly of the state of Missouri approved March 10, 1869, entitled "An Act in relation to Swamp and Overflowed Lands" it is provided that all the Swamp and Overflowed Lands, lying within the limits of the several counties of this State which were granted and have been patented to the State of Missouri by an act of Congress entitled "An Act to Enable the State of Arkansas and other States to reclaim the Swamp Lands within their limits" approved September 28, 1850, shall be conveyed to the different Counties in the State of Missouri, in which such lands may lie; and,

Whereas, The several tracts and parcels of land hereinafter described have been patented as "Swamp and Overflowed Lands by the Government of the United States and are inuring to the State of Missouri under the act aforesaid, being situate in the county of Scott, in the State of Missouri, to-wit:

Township Thirty, (30) north, of Range Thirteen East: The south half of Section Twenty-five (25).

Township Thirty (30) north, of Range Fourteen East: The west half; The west half of the northeast quarter; the southeast quarter of the north-east quarter, and the west half of the southeast quarter of Section Thirty (30), containing in all five hundred and fifteen and sixty-five hundredths (515.65) acres.

Containing in the aggregate One Hundred and Thirteen Thousand Three Hundred and Eighty-five and Nineteen Hundredths (113,385.19) acres, according to the official plats of survey of the said lands returned to the General Land Office by the Surveyor General.

Now therefore know ye, That the State of Missouri in consideration of the premises and in conformity with the act of the General Assembly aforesaid, has Given and Granted and by these presents does Give and Grant unto the said County of Scott, in fee simple subject to the disposal of the County Court thereof, and subject also
0 to the various restrictions of law, the tracts of land above described;

To have and to hold, the same together with all the rights, privileges, immunities and appurtenances thereto belonging, unto the said County of Scott in fee simple, and to its assigns forever.

In testimony whereof, I, Joseph W. McClurg, Governor of the State of Missouri, have caused these letters to be hereunto affixed.

Given under my hand at the City of Jefferson this 29th day of April in the year of our Lord One Thousand Eight Hun-
L. S.] dred and Seventy, of the Independence of the United States the ninety-fourth, of the State of Missouri the fiftieth.

J. W. McCLURG.

FRANCIS RODMAN,
Secretary of State.
By EUGENE F. WEIGEL, *Chief Clerk.*

Recorded Vol. 2, pages 299 to 316 inclusive.

JOSEPH H. McGEE,
Register of Lands.

Received, filed and recorded the foregoing Deed, this August 15th, A. D. 1870.

GEORGE W. ARNOLD, *Recorder.*

To which the plaintiff objects on the ground that the instrument is wholly irrelevant, incompetent and immaterial to the issues in this case.

By the COURT: Objection overruled.

To which the Relator excepts.

Defendant next offers a deed from the directors or trustees of the Cape Girardeau and Scott County Macadamized Road Company to the Scott County Macadamized Road Company, dated the 27th day of May, 1903, filed for record and recorded in the Recorder's office of Cape Girardeau County, in Book 41, page 29, conveying the road, marked Exhibit 12.

Whereas, By an Act entitled "An Act to incorporate the Cape Girardeau & Scott County Macadamized Road Company,"
51 a company was organized to build a macadamized road from Cape Girardeau to Scott County; and,

Whereas, Doubts have been raised as to whether or not said corporation is still a subsisting and existing corporation under said Act as aforesaid, approved February 24th, 1853; and

Whereas, By Section 976, Chapter 12, Revised Statutes of Missouri, 1899, it is provided that the President and directors or managers of the affairs of a corporation which may be dissolved by lapse of time shall be trustees of such corporation with full power to settle its affairs and collect its outstanding debts and divide the moneys and other property belonging to said corporation at the time of its dissolution among its stockholders after paying all debts due and owing by said corporation at the time of its dissolution so far as such money and property will enable them to do so; and

Whereas, A new corporation has been organized under the laws of the state of Missouri under the name and style of the "Scott County Macadamized Road Company" which desires to purchase and acquire the property of said Cape Girardeau & Scott County Macadamized Road Company and to unite and consolidate its road extending from the city of Cape Girardeau to the town of Kelso in Scott County and make said consolidated and united road one macadamized road:

Now, Therefore, This Indenture made and entered into this 27th day of May, A. D. 1903, by and between Louis Houck, President, E. F. Blomeyer, J. B. Nesmith, Robert G. Ranney and R. T. Giboney, directors and managers of the affairs of the said Cape Girardeau & Scott County Macadamized Road Company prior to and on the 24th day of February, A. D. 1903, parties of the first part, and the Scott County Macadamized Road Company, a corporation duly incorporated under and by virtue of the laws of the State of Missouri, party of the second part.

Witnesseth: That for and in consideration of the sum of one dollar to them in hand paid and the receipt of which is hereby
52 acknowledged and in consideration of the issuance to the various stockholders of the said Cape Girardeau & Scott

County Macadamized Road Company of shares of its capital stock equal to the number of shares held by each of the stockholders of the said Cape Girardeau & Scott County Macadamized Road Company as aforesaid and the total capital stock of the Scott County Macadamized Road Company not to exceed in amount the capital stock of the said Cape Girardeau & Scott County Macadamized Road Company to-wit: the sum of fifteen thousand dollars, have this day granted, bargained, sold, transferred and conveyed, and by these presents do hereby grant, bargain, sell, convey, confirm and set over to the said Scott County Macadamized Road Company the following described real estate, property, assets, rights and franchises of the said Cape Girardeau & Scott County Macadamized Road Company, if any it have, as follows, to-wit: A strip of ground sixty (60) feet wide, beginning at the city limits of the city of Cape Girardeau at the South terminus of Sprigg Street and running thence in a southerly direction through Surveys No. 2199, No. 2202, No. 812 and No. 2919, and thence through Sections 24 and 25 in Township 30 North Range 13 East in the County of Cape Girardeau, State of Missouri, and through sections 30 and 31, Township 30 North Range 14 East and thence through Survey No. 2191 to the foot of the Scott County hills and as far as said Cape Girardeau & Scott County Macadamized Road is constructed and built through Scott County, and also hereby grant, sell, convey, confirm and set over to the said Scott County Macadamized Road Company the Toll Gate No. 1 located on Survey No. 2199 and buildings and appurtenances to said Toll Gate belonging and also the Toll Gate No. 2 located on Section 24, Township 30 North Range 13 East and the said property, real estate and buildings of said Toll Gate embracing about one acre more or less, and further sell, grant and convey, confirm and set over to the said Scott County Macadamized Road Company the macadamized and metal road constructed over and along and on said strip of land, now belonging to and is owned by the said Cape Girardeau & Scott County Macadamized Road Company or has been owned by
53 said Cape Girardeau & Scott County Macadamized Road Company heretofore.

To have and to hold the above and foregoing real estate, property, Toll Gates, buildings and real estate appurtenant thereto and lands and tenements as fully as the same is now had and held by the said parties of the first part trustees as aforesaid and as the same was held by the said Cape Girardeau & Scott County Macadamized Road Company.

In Witness Whereof, the undersigned, late president, directors and managers as aforesaid of the said Cape Girardeau & Scott County Macadamized Road Company have this 27th day of May, A. D. 1903, signed and sealed the foregoing instrument as trustees under Section 976, Chapter 12, Revised Statutes of Missouri, 1899, as by law provided.

LOUIS HOUCK. [SEAL.]
E. F. BLOMEYER. [SEAL.]
R. G. RANNEY. [SEAL.]
J. B. NESMITH. [SEAL.]
R. T. GIBONEY. [SEAL.]

STATE OF MISSOURI, *County of Cape Girardeau, ss:*

On this 27th day of May, A. D. 1903, before me personally appeared Louis Houck, E. F. Blomeyer, R. G. Ranney, J. B. Nesmith and R. T. Giboney, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

My Commission as Notary Public will expire on 10th day of November, 1906.

[SEAL.] ROLLIN B. ANDREWS,
Notary Public.

Judge BURROUGHS: We object to this deed, first, because the acknowledgment is defective and not made according to the Statute, in this that it fails to contain the affidavit as to the official relation of the parties signing the deed, second, the deed is no proof
54 of the truth of its recitals, third, that neither the old company or the last board of directors or trustees had any power or authority after February 24th, 1903, to convey the road bed to this Respondent or anyone else, or the right or power or authority to convey to any person, to this defendant, the right to take toll on said road, and fourth, because Respondent had no authority under its charter or under the laws of this state to buy or acquire or purchase an improved road from any company, that its sole power was to construct a new road.

By the COURT: Objection overruled.

To which the Relator excepts.

Defendant next offers the contract of consolidation between the Cape Girardeau and Scott County Macadamized Road Company as chartered by an Act of February 24th, 1853, under which defendant is incorporated, marked Exhibit 13.

Whereas, The Cape Girardeau & Scott County Macadamized Road Company, a corporation, duly incorporated by an Act entitled "An Act to incorporate the Cape Girardeau & Scott County Macadamized Road Company" approved February 24th, 1853, was authorized to build and construct a road across the Big Swamp and to extend said road to the City of Cape Girardeau; and,

Whereas, The said Company did so construct its said road and did extend the same to the city of Cape Girardeau; and,

Whereas, The Scott County Macadamized Road is a company duly incorporated by the laws of the State of Missouri, under Chapter 12, Article 5, and was incorporated on May 26th, 1903, in that behalf to build a road from the southern terminus of Sprigg Street on the limits of the city of Cape Girardeau to Kelso in Scott County, Missouri; and,

Whereas, The owners of the majority of the stock in the said several companies have authorized the Board of Directors of said several companies to make a contract to unite and consolidate their several interests as provided by Section 1221, Article 5, Chapter
55 12, Revised Statutes of Missouri, 1899.

Now Therefore, this contract entered into this 27th day of May, A. D. 1903, by and between the Cape Girardeau & Scott County

Macadamized Road Company, party of the first part, and the Scott County Macadamized Road Company, party of the second part;

Witnesseth, that for and in consideration of the sum of one dollar to the said Cape Girardeau & Scott County Macadamized Road Company paid by the said Scott County Macadamized Road Company and in consideration of the issuance to its stockholders of the sum of fourteen thousand nine hundred and fifty-five dollars of its paid-up stock and the receipt of which is hereby acknowledged, the said Cape Girardeau & Scott County Macadamized Road Company hereby agrees to unite and does unite and consolidate its said road for the joint use of it the said Cape Girardeau & Scott County Macadamized Road and said Scott County Macadamized Road and hereby sets over and assigns for such joint use and occupation its metallic road or macadamized road extending from the southern limits of the city of Cape Girardeau and where terminates, Sprigg Street, to the hills of Scott County on the south, and where its said metallic road or macadamized road now terminates, and running through the following described pieces, parcels and tracts of land belonging to it, the said Cape Girardeau & Scott County Macadamized Road: Surveys No. 2199, No. 2202, No. 812, and No. 2919, Sections 24 and 25, in Township 30 North Range 13 East in the County of Cape Girardeau, State of Missouri, and through Sections 30 and 31, Township 30 North Range 14 East and through Survey No. 2191, and which said right of way and road is sixty feet wide.

To have and To Hold the above and foregoing described property for the joint use of the said Cape Girardeau & Scott County Macadamized Road as aforesaid and the said Scott County Macadamized Road as aforesaid, and the said roads to be forever united and consolidated into one road, and the Scott County Macadamized Road in consideration of the premises aforesaid and consideration
56 aforesaid to have all the franchises, privileges and rights of the said Cape Girardeau & Scott County Macadamized Road as fully as if here definitely and distinctly set out, and the said Cape Girardeau & Scott County Macadamized Road Company hereby sets over and transfers the use of its toll gates and other property to the said Scott County Macadamized Road and the said company to as fully possess the same and own the same for the benefit of the road companies so united and consolidated as the said Cape Girardeau & Scott County Macadamized Road now owns and possesses the same.

In Witness Whereof, the said several companies have signed this contract in duplicate by their respective presidents being duly thereunto authorized by the Board of Directors in that behalf and caused the said signatures to be attested by the corporate seal of the said several companies duly attested by the Secretaries, this the 27th day of May, 1903.

CAPE GIRARDEAU & SCOTT COUNTY
MACADAMIZED ROAD COMPANY,
By LOUIS HOUCK, *President.*

Attest: R. G. RANNEY, *Secretary.*

SCOTT COUNTY MACADAMIZED ROAD
COMPANY,
By GIBONEY HOUCK, *President.*

Attest: R. B. ANDREWS, *Secretary.*

Mr. DEMPSEY: We object to that on the ground that under the Act incorporating the Cape Girardeau and Scott County Macadamized Road Company and under the charter of the defendant, this attempted consolidation is without right or authority and it is otherwise incompetent, irrelevant and immaterial.

Objection overruled.

To which the Relator excepts.

Judge BURROUGHS: We make the further objection that the new company under the law had no power to acquire by con-
57 solidation or purchase the right of way of the old company; that the Cape Girardeau and Scott County Macadamized Road Company on May 27th, 1903, at the time of the date of the execution of this so-called consolidation agreement was a dead corporation and could not act, had no power or authority to act by its President and Secretary; that at the time of this alleged conveyance the roadway of this old company was public property and invested in the public, free from the right to take toll and that the old company at that time had no control over the same of any kind or character whatever, and further object that on the very same day when this so-called consolidation agreement was made by the old company and the new, there was not a proper conveyance by the trustees of the old company to the new of all the corporate assets and the two schemes are inconsistent and that they both can not stand.

Objection overruled, to which Relator excepts.

Defendant next offers a certified copy of an order from the records of Cape Girardeau County of the condemnation proceedings against James B. Dennis and others by the Cape Girardeau and Scott County Macadamized Road Company containing all the proceedings, appointment of the commissioners, report of commissioners and also the mandate from the Supreme Court, Exhibit 14.

STATE OF MISSOURI, *County of Cape Girardeau, ss:*

In the Circuit Court, May Term, 1874.

CAPE GIRARDEAU AND SCOTT COUNTY MACADAMIZED ROAD COMPANY, Pl'tff,

vs.

JAMES B. DENNIS and RACHEL C. DENNIS, Defendants.

To the Honorable David L. Hawkins, Judge of the Circuit Court:

Plaintiff states that it was incorporated under the laws of the State of Missouri, by an Act entitled "An Act to Incorporate the
58 Cape Girardeau and Scott County Macadamized Road Company," approved February 24th, 1853.

That defendant are husband and wife; that said defendant, Rachel C. Dennis, is the owner in fee of Out Lot No. 63 of Survey No. 2199, confirmed to Don Louis Lorimier, and his legal representatives;

That the plaintiff is desirous to construct its road from a point on the southern end of Sprigg Street, on the southern boundary line

of Cape Girardeau City, in a direct line to a point where its bridge across Cape La Croix Creek has been constructed; that the plaintiff desires to obtain the right of way as set forth sixty feet wide between said two points; that plaintiff and defendants can not agree upon the proper compensation to be paid, and that defendant utterly refuses to allow said road to be constructed in the proper direction; that said strip of land is necessary to construct said road.

The premises considered plaintiff prays that three disinterested commissioners may be appointed by your Honor according to law to assess the damages which the defendants may sustain by reason of the construction of said road as proper and for such other relief as to the Court may seem meet and just.

THE CAPE GIRARDEAU AND SCOTT COUNTY
MACADAMIZED ROAD COMPANY,
By LOUIS HOUCK, *Its Attorney.*

Filed 5th May, 1874.
N. C. HARRISON, *Clk.*

Order Appointing Commissioners.

Omitting Caption.

And now again come the parties in the above named cause by their respective attorneys and the Court being now fully advised of and concerning the petition of said Road Company and the written objections of said defendants thereto, doth order and adjudge that the said objections be in all things overruled, to which ruling the defendant- except and object and move the Court for a new hearing of the cause, which motion being submitted is by the Court also overruled, to which ruling the defendants except and tender their
59 bill of exceptions, which, being seen, is by the Court signed and sealed and ordered to be filed and made a part of the record in said cause.

Thereupon the Court doth appoint George W. Snider, William Looney and E. W. Russell, residents of this county, as Commissioners to assess the damages, if any, that may be sustained by the said defendant by reason of the location and construction of said Macadamized Road, as prayed for in Company's petition.

And it is further ordered by the Court, that said Commissioners make their report of said assessment under oath on or before the first day of the next term of this court and this cause is continued."

Report of Commissioners.

Omitting Caption.

To the Honorable Circuit Court of Cape Girardeau County in the State of Missouri:

We, the undersigned, having been appointed by said Court at the November Term thereof, 1874, as commissioners to assess the dam-

ages, if any, that may be sustained by the defendants, James B. and Rachel C. Dennis, by reason of the location and construction of said road over or through the lands of the said James B. Dennis and Rachel C. Dennis as proposed in the plaintiff's petition.

Beg leave to report that, after having been duly sworn faithfully and impartially and without prejudice to perform the duties imposed upon us as such commissioners, we proceeded to said premises and proceeded to view the said proposed route and the premises of said defendants adjoining the same, and after taking into consideration the advantages, as well as the disadvantages, to the said defendants, James B. and Rachel C. Dennis, by reason of the location and construction of said road, as prayed for in said plaintiff's petition. We assess the damages sustained by the said James B. Dennis and Rachel C. Dennis at the sum of One Hundred and Eighty Dollars by reason of the location and construction of the said Cape Girardeau and Scott County Macadamized Road over the lands of the said defendants.

All of which is most respectfully submitted.

Given under our hands and seals as such commissioners
60 this January 9th, A. D. 1875.

E. W. RUSSELL, [SEAL.]
GEORGE W. SNIDER, [SEAL.]
WILLIAM S. LOONEY, [SEAL.]
Commissioners.

Affidavit made by them as provided by statute.

Order Confirming Commissioners' Report.

And on Monday, May the 5th, 1875, the following further proceeding was had in this cause, to-wit:

"And now come the said parties by their attorneys and the Court being fully advised of and concerning the report of the Commissioners heretofore filed in said cause doth order and adjudge that said report be in all things confirmed and approved.

Whereupon defendants move the Court for a new hearing for reasons filed."

Order Granting an Appeal.

And on Tuesday, the 11th day of May, 1875, the following further proceeding was had, to-wit:

"And now comes the said defendants and present their bond and affidavit praying an appeal of this cause to the Supreme Court, which bond being signed by Robert L. Wilson and Rober H. Crawford, as securities, is deemed sufficient, and by the Court ordered to be approved and the Clerk ordered to certify this cause to said Supreme Court for further proceedings upon the appeal herein granted.

Mandate of the Supreme Court.

Omitting Caption.

Appealed from Cape Girardeau Circuit Court.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Cape Girardeau County Circuit Court rendered, be in all things affirmed and stand in full force and effect. And it is further considered and adjudged by the Court that the said respondent recover against the said appellants' costs and charges herein expended, and have there-
61 for execution. (Opinion filed.)

Duly certified by the Clerk of Supreme Court and all of above records and papers duly certified by the Clerk of the Cape Girardeau Circuit Court.

To which Relator objects on the ground that the proceedings purport only to convey the right of way to the old Cape Girardeau and Scott County Macadamized Road Company and that whatever right of way it might have acquired reverted to the public on the 24th of February, 1903.

By the COURT: Objection overruled.

To which Relator excepts.

Defendant next offers a deed from Louis Houck and wife to the Scott County Macadamized Road Company conveying all of the road bed therein described, dated the 4th day of June, 1903, and recorded in Book 41, page 52, marked Exhibit 15.

"This deed made and entered into this 4th day of June, A. D. 1903, by and between Louis Houck and Mary H. G. Houck, his wife, of the County of Cape Girardeau and State of Missouri, parties of the first part, and the Scott County Macadamized Road Company, a corporation duly incorporated under the laws of the State of Missouri, party of the second part;

Witnesseth, That for and in consideration of the sum of One dollar to them in hand paid and for and in consideration of certain capital stock of said Company issued to them in an adjustment of the claims of the Cape Girardeau & Scott County Macadamized Road Company, a corporation incorporated under the laws of the State of Missouri, February 24th, 1853, and the receipt of which said consideration is hereby acknowledged, do by these presents Remise, Release, Convey, Grant and Forever Quit-claim unto the said Scott County Macadamized Road Company, the following described lots, tracts and parcels of land lying and being situate in the Counties of Cape Girardeau and Scott, State of Missouri, to-wit: A strip of ground sixty (60) feet wide and upon which heretofore has been constructed the macadamized and gravel road of the Cape Girardeau & Scott County
62 Macadamized Road Company and which said road passes over the following real estate and property of the said parties

of the first part and the said real estate and property aforesaid upon which said road was constructed, being the property, land and estate of the said parties of the first part, that is to say: Out Lots sixty-four (64) and sixty-three (63) of Survey two thousand one hundred ninety-nine (2199), Survey eight hundred twelve (812) and Survey two thousand nine hundred nineteen (2919), Sections twenty-four (24) and twenty-five (25), Township thirty (30) North Range thirteen (13) East and over and across Section thirty (30), Township thirty (30) North Range fourteen (14) East.

To have and to hold the above and foregoing described real estate with all and singular the rights, privileges and appurtenances thereto belonging, or in any wise appertaining, unto the said party of the second part and to its successors and assigns forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LOUIS HOUCK. [SEAL.]
MARY H. G. HOUCK." [SEAL.]

Mr. DEMPSEY: To which the relator objects on the ground that it purports to convey to the Scott County Macadamized Road Company the right of way or fee simple title to land which for more than fifty years had been used and occupied by the public as a public highway subject to the right of the Cape Girardeau and Scott County Macadamized Road Company to take *poll* thereon up to and including February 24th, 1903.

By the COURT: Objection overruled.

To which Relator excepts.

Defendant next offers a deed from J. H. and W. L. Killebrew to the Cape Girardeau and Scott County Macadamized Road Company, dated the 17th day of June, 1902, marked Exhibit 16.

"This Indenture, made and entered into this 17th day of
63 June, A. D. 1902, by and between K. H. and W. L. Killebrew, parties of the first part, and the Cape Girardeau and Scott County Macadamized Road Company, a corporation duly incorporated under the laws of the State of Missouri, party of the second part.

Witnesseth, That for and in consideration of the sum of One ($1) dollar to the said parties of the first part by the said party of the second part in hand paid, and the further consideration of a conveyance of its road and right-of-way sixty (60) feet wide, running from the west line of Survey 2202, and the east line of Survey 812, and running thence northerly through said Survey 2202 over and across the land conveyed to said parties of the first part by George Earl Alt and wife, and Benjamin F. Davis, Trustee, the said parties of the first part, have, and by these presents do grant, convey and quit-claim to the said party of the second part, said Road Company, a strip of ground sixty (60) feet wide, running along and with the right-of-way of the St. Louis, Memphis & Southeastern —, and the east line of said strip of sixty feet being the west line of said right-of-way of said railroad; and the said strip of sixty feet beginning, as stated, on the west line of said Survey 2202, and running thence, as afore-

said, sixty (60) feet wide in a northerly direction through the land of the said parties of the first part so as aforesaid conveyed to them by said George Earl Alt and wife, and Benjamin F. Davis, Trustee, as aforesaid.

To have and to hold the said strip of ground as aforesaid sixty feet wide, for the purpose of operating and owning thereon a Macadamized and Gravel Road, forever, either by itself or its successors or assigns; Provided, however, that if at any time said Gravel Road Company, or its successors or assigns, should abandon said Gravel Road and business of operating and running the Gravel Road over said strip of ground, that then the said strip of ground shall revert to the parties of the first part or their assigns.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

K. H. KILLEBREW. [SEAL.]

64 W. L. KILLEBREW." [SEAL.]

Duly acknowledged.

Mr. DEMPSEY: Relator objects to the offer in the first place on the ground that it is not shown that the parties grantor in this instrument had any right, title or interest in the property which it purports to convey, and furthermore whatever interest, if any, was conveyed was to a strip of land which for more than fifty years prior thereto had been occupied by the public and used by the public as a highway subject to the right of the Cape Girardeau Macadamized Road Company to take toll thereon and such right ceased on the 24th of February, 1903, and we object to it as incompetent and immaterial.

By the COURT: Let the objection be overruled.

To which Relator excepts.

Defendant next offers a deed from Giboney Houck to the Scott County Macadamized Road Company, dated June 4th, 1903, filed for record June 5th, 1903, and recorded in book 46, at page 85, marked Exhibit 17.

"This deed, Made and entered into this 4th day of June, A. D. 1903, by and between Giboney Houck, of the County of Cape Girardeau, and State of Missouri, party of the first part, and Scott County Macadamized Road Company, a corporation duly incorporated under the laws of the State of Missouri, party of the second part,

Witnesseth, That the said party of the first part, in consideration of the sum of One Dollar and other good and valuable consideration to him paid by the party of the second part, the receipt of which is hereby acknowledged, does by these presents, Remise, Release, and Forever Quit-claim unto the said party of the second part the following described lots, tracts or parcels of land, lying, being and situate in the County of Scott and State of Missouri, to-wit:

A strip of ground sixty (60) feet wide and upon which heretofore has been constructed the macadamized and gravel road of the Cape Girardeau & Scott County Macadamized Road Company, passing over and across section twenty-five (25), township thirty (30)

65 North range thirteen (13) East, and section thirty (30), township thirty (30) North Range fourteen (14) East.

To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging, or in any wise appertaining, unto the said party of the second part, and unto its successors forever; so that neither the said party of the first part, nor his heirs, nor any other person or persons for him or in his name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred.

In witness whereof, the said party of the First Part has hereunto set his hand and seal the day and year first above written.

GIBONEY HOUCK." [SEAL.]

Duly acknowledged.

To which the relator objects on the ground that it doesn't appear by competent evidence that the grantor had any right, title or interest in the land purported to be conveyed and further that at the time of conveyance the said roadway had for more than fifty years prior thereto been used as a public highway subject to the right of the Cape Girardeau & Scott County Macadamized Road Company to take toll thereon up to and including February 24th, 1903, and at the time of the date of said deed and said right had ceased and the right in the public to it as a public highway had become absolute.

By the COURT: Objection overruled.

To which the relator excepts.

Defendant next offers a deed from Malcolm Nesmith and wife to the Scott County Macadamized Road Company dated the 18th of July, 1903, conveying part of the road bed; filed for record August 26th and recorded in Book 33, page 452, marked Exhibit 18.

"This Indenture made on the 18th day of July, A. D. One Thousand Nine Hundred Three by and between Malcolm B.
66 Nesmith and Lucy A. Nesmith, his wife, of the County of Scott and State of Missouri, parties of the first part, and Scott County Macadamized Road Company, a corporation organized under and by virtue of the laws of the State of Missouri, party of the second part.

Witnesseth, That the said parties of the first part, in consideration of the sum of One Dollar to them paid by the said party of the Second part, the receipt of which is hereby acknowledged, do by these presents, Remise, Release, and Forever Quit-Claim, unto the said party of the second part, the following described Lots, Tracts or Parcels of Land, lying, being and situate in the County of Scott, and State of Missouri, to-wit:

The strip of land on which the road of the party of the second part is located being sixty feet wide and running through and across Sections No. thirty (30) and thirty-one (31), township thirty (30) North, range 13 East, and also through and across Survey No. 185 in the same township and range.

To Have and To Hold the same, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said party of the second part, and its heirs and assigns Forever, so that neither

ie said parties of the first part, nor their heirs, nor any other person r persons for them or in their names or behalf, shall or will hereafter claim, or demand any right or title to the aforesaid premises or ny part thereof, but they and every one of them by these presents, e excluded and forever barred.

In Witness Whereof, the said parties of the first part have hereunto set their hands the day and year first above written.

MALCOLM B. NESMITH. [SEAL.]
LUCY A. NESMITH." [SEAL.]

Duly acknowledged.

To which Relator makes the same objection.

By the COURT: Let the objection be overruled.

To which the Relator excepts.

R. G. RANNEY, of lawful age, being produced, sworn and examined on behalf of defendant, on his oath deposeth and saith:

Direct examination by Mr. SMITH:

Q. Mr. Ranney: State your name, residence and business?

A. R. G. Ranney, Cape Girardeau, Mo., Attorney at Law.

Q. Are you acquainted with the old Cape Girardeau & Scott ounty Macadamized Road known now as the Scott County Macadaized Road?

A. Yes, sir.

Q. How long have you been acquainted with that road?

A. Almost, as long as I can recollect, I don't know exactly what ear it was; the first time I ever saw the road was on my way down where Governor Brown was buried, the day preceding his funeral.

Q. You don't remember what year that was?

A. I think that was in '54, but I am not sure.

Q. What do you remember about the road at that time?

A. I know that they were constructing the road at that time.

Q. Who was constructing it?

A. I don't know who was constructing it, but I saw men at work d part of it was covered with stone and part wasn't.

Q. They were constructing the present road, the road that was nstructed by the Cape Girardeau Macadamized Road Company?

A. Yes, sir.

Q. State whether the road—what conditions were they in, new or l?

A. It was new, it wasn't finished.

Q. How about the embankment, as to distance how was it?

A. I can't say how much, there was part of it where they had just cently thrown up the embankment or the levee and it wasn't covd with stone and part of it looked to be recently covered with stone. They were throwing dirt out of the bottom onto the road bed and men were working on it when I saw it.

Q. Could you state about how high they were raising e embankment?

A. I can't state, but it looked to me like it was pretty high at that me.

Q. How far was this from Governor Brown's residence?
A. It was near the other end, can't say how far.
Q. You mean the Scott County end?
A. Yes, sir.
Q. Was this in Scott County or Cape Girardeau or both counties?
A. From my acquaintance with the country since then, where they were working on that road bed, would say it was in Scott County.
Q. Do you remember whether the stone which was placed on this road was packed or loose?
A. It was loose.
Q. What in your opinion does that show as to the age of the road?

Objected to by counsel for relator.

A. I don't know.

Cross-examination by Mr. DEMPSEY:

Q. You are one of the attorneys of record in this case, are you not?
A. I believe I am, yes, sir.
Q. Did you have any personal knowledge of the existence of this road prior to 1854?
A. None at all; I was quite small at that time.

LOUIS HOUCK, of lawful age, being produced, sworn and examined on behalf of defendant, on his oath deposeth and saith:

Direct examination by Mr. SMITH:

Q. State, Mr. Houck, your name, age and residence?
A. Louis Houck, live in Cape Girardeau.
Q. What is your business?
A. Well, I am, *I suppose* to be in the railroad business and in the farming business.

69 Q. How long have you known the Cape Girardeau & Scott County Macadamized Road, we are talking about?

A. I think I have known it since the summer of '69, the first time that I passed over it.
Q. Do you know anything about the property owners along this line of roadway?
A. Yes, sir.
Q. What was the north terminus of the road in 1869?
A. The end of the rock levee there is on what they call the Toussaint Godair Survey.
Q. How far south of the city limits?
A. Approximately four miles, three and a half or four miles.
Q. Who constructed the road from that point to the city?
A. I might say I constructed it; there had been some work done, prior to the time I got control of the road, in isolated places; I suppose about two-thirds of the work was done, then I began the construction of it in 1873 and finished it that year to the Cape La Croix Creek, put a bridge across it and when I got through with the litigation with Major Dennis I constructed it to the city limits, to the foot

of Sprigg street; between out-lots 50 and 51, survey 2199, in 1873; from the North line of out-lot 47 down to the south line of out-lots 51 and 53 I sold the property to the city and had a street opened; that was the first time the street was opened there; Sprigg street was extended three-fourths of a mile to reach to what is now the beginning part of the Scott Macadamized Road, prior to that time there was no street to where that road now begins.

Q. I will ask you whether or not there was any road from the North end of the levee to the foot of Sprigg street prior to this time?

A. Not prior to the time I constructed it. The road that came from Scott County the first time I went across there in the summer of 1869, started from the corner of Good Hope and Sprigg streets down to what is now called College street, which is on the north line of out-lot 47, then it went diagonally across out-lot 46 to a line between out-lot- 51 and 52 and went thence south through a lane called Beaudean's Lane, then across there diagonally to the Cross Ford of Cape La Croix, which was about 600 feet above the present bridge; then we went up to the top of the ridge and followed the top of that ridge to within about 500 feet of the end of the rock levee and descended the hill and then struck the rock levee. This road then ran, I should say, 500 feet from Good Hope street in the first place to what was then the end of Sprigg street, from there to Beaudean's Lane it was a quarter of a mile, then from the lane to the ford a half mile, then we went diagonally across the ford, then over the hill about two miles, and then down the hill we went about 600 feet to the rock levee.

Q. So that no part of the rock road which you built was located on the old public road?

A. No, sir, not one inch.

Q. Who acquired the right of way?

A. I did and my predecessor. I acquired the right of way, I interested every land owner, after I got possession of enough of the rock—I interested every land owner and I got the right of way and where I couldn't get the right of way, I either purchased it or condemned it—the only litigation I had was with Major Dennis, cost about $300 going through an almost impassable place; before that time I will say that wagons, before we constructed that road, men with four and six horses would get mired up in that place and have to be dragged out within less than 500 feet of the city limits of Cape Girardeau.

Q. Do you remember how much that road cost?

Objected to by counsel for relator as immaterial.

By the COURT: Answer the question.

To which relator excepts.

A. The total cost of the road from the rock levee to Cape Girardeau, approximately $12,000.

Q. From your knowledge of road building, what would it cost to build a road from the rock levee to the Cape, can you give any opinion as to what it would cost to build one entire road?

Objected to by counsel for relator.

By the COURT: Answer the question.

71 To which the relator excepts.

A. The road from the rock levee across the swamp, every yard of rock had to be hauled for three miles, if you take it from one side entirely—a large part of it had to be hauled two miles by wagon; before you could construct that road as it is at present you would have to throw up an embankment; the embankment averages from 18 inches to 2½ feet; you take that by the yard you can calculate how much it costs to throw up an embankment; you can't throw up that embankment for that road for less than $1,000 a mile; I don't know what it cost—I am talking about the present time. I don't know what it cost fifty years ago and I can't make any estimate because we have stone crushers and facilties for constructing that those people at that time didn't have, but in my judgment, taking the road as an entirety across the swamp at the present time, as an original proposition, it could not be constructed for less than $10,000. I think that is a very constructive estimate. This is entirely a macadamized road, with 12 to 15 inches of broken stone, with no heavy rock on an average, of from 15 to 16 feet wide.

Q. Have you any knowledge from any record of the old road as to the cost of that property?

Mr. DEMPSEY: We object to that as the record speaks for itself.

Q. Have you any record that you could refer to to give us any information on that subject?

A. Yes, sir, we have the records here.

Q. What was the character of the country over which this road was built, especially the north end?

A. Gumbo country.

Q. Tell us what gumbo is?

A. It is a waxy soil; when it is dry it is hard as rock and when it is wet it is like soft soap.

Q. Is it without bottom?

A. You can get down to it, I suppose after a while, but it is soft; it is a sticky, waxy soil, like soap when it is wet and when it is dry it gets very hard and lumpy and is hard to handle. I know

72 that in constructing railroads if you strike that kind of material you strike material that is hard to handle.

Q. Have you in your mind any estimate as to what the profits of this road have been for the past years?

Objected to by counsel for relator as being incompetent and immaterial.

By the COURT: Proceed.

A. Ever since I have been in control I can tell you. Why for the first five or six years after 1873, when I first got possession of the road, the stockholders didn't get anything out of it.

Q. Why?

A. Why all the proceeds of the road were absorbed in putting the road in good condition across the swamp; it had deep holes in it and in the high water we had to dig ditches and build arched bridges,

ıd to embank the road, had to make it better and so on, and in
at way all the proceeds of the road were absorbed. The capital
ock of the road is only $15,000, while the total cost of construction
the present basis is not less than $25,000 on the present property
e got.

Q. What interest did you collect on this capital stock?

A. 4 per cent. in the last 12 years per year.

Q. On that basis have the proceeds paid for the construction
it?

A. The capital of that road has never paid even ordinary interest.
I had the money loaned out at the price I had to pay for money
would be a good deal better off.

Q. If it cost $25,000 to build it, it hasn't averaged over 2 or 2½
r cent. on the capital?

A. Yes, sir, on the capital invested in the road.

Q. From the statements you have made as to the profits or interest
you consider that the stockholders have ever been reimbursed?

Objected to by counsel for relator.

By the COURT: I think your objection ought to be sustained.
I think that is immaterial; he may state the facts.

To which ruling of the court respondent objected and excepted at the time.

Q. Do you know, Mr. Houck, whether this road was ever offered
the County Court by the owners of it?

Objected to by the relator as immaterial.

By the COURT: Answer the question.

To which the relator excepts.

A. There never was any formal offer made that I knew of.

Q. Was there any small water course of any kind across this old
k levee road?

A. There were no water course, but there were two channels of the
mps; when the water gets high in Ramsey Creek, the overflow of
Creek rises and presses against the road bed and the river gets
re also in times of overflow—during the time that I have been
control of the road the Mississippi has overflowed four times; only
spring the Mississippi run over that road bed and ran over it
rly the entire distance from 1½ to 5 feet.

Q. These water channels were not confined by banks?

A. No, sir.

Q. Where are the bridges?

A. We have one arched bridge in Scott County and two or three
all bridges, the last bridge I constructed last year; this bridge
$1200 and is across Cape La Croix Creek in Cape Girardeau
nty, the road runs along on the hillside—we have to keep the
hes opened and put in a number of tilings, little bridges to divert
water into these tilings to prevent the water from running over
roadway.

Q. How many times has the Mississippi overflowed in the last ten
rs?

A. It has overflowed twice in the last ten years, from 1893 to 1903, in 11 years, but prior to that time we had two overflows in succession and the fact is when the overflow goes over the road it takes off the fine material and carries it down into the ditches in that way and where the water has then overflowed the road it becomes very rough and it has to be recovered with fine material. When I took hold
74 of the road there were a good many chuck holes in the road, the foundation gave way, wagons were stalled in the road; with each overflow the top cover would wash away, loosening the rock and in that way there is a great deal of damage.

Q. Is there anything else you desire to state?

A. I don't know of anything else.

Cross-examination by Mr. DEMPSEY:

Q. Then, Mr. Houck, financially the road is not a paying proposition and is not to-day? You gave your opinion as to how much the road is worth?

A. I stated what it cost.

Q. Do you consider it a good money making proposition to-day?

A. No, sir, I do not.

Q. How much do you think it is worth on the basis of what it returns?

A. I think it is worth about between $7,000 and $10,000. I have been willing for a number of years and made repeated offers to turn the road over to the county for $10,000 and had the public spirit of Cape Girardeau—Judge Burroughs——

We object to his argument.

Q. How long is the part of this road which is commonly known as the rock levee road?

A. Approximately three miles, not quite three miles.

Q. When did you first become connected with the road as a stockholder?

A. 1873.

Q. You didn't become a stockholder in 1869, you just went over the road?

A. Yes, sir.

Q. At the time you became a stockholder in the road there was no bonded indebtedness of the company outstanding?

A. No, sir, there was no bonded indebtedness; I think there was about $500 or $600 floating indebtedness on account of repairs.

Q. Did you issue any bonds after you became connected with the road?

A. Yes, sir, created an indebtedness of about $2,000 used
75 in part for construction; paid 10 per cent. interest on these bonds for a number of years; the last bonds were cancelled a short time ago. Judge Burroughs got his money last February, I think.

Q. The rate of interest on these bonds was 10 per cent.?

A. Yes, sir.

Q. You know that this old company had no bonded indebtedness before your connection with the company?
A. No, sir, they had no bonded indebtedness.

J. B. NESMITH, of lawful age, being produced, sworn and examined on behalf of defendant on his oath deposeth and saith.

Direct examination by Mr. SMITH:

Q. State your name and business?
A. I am a surveyor by occupation.
Q. Where do you live?
A. Scott County.
Q. I will ask you if you know anything about the construction of this road from the North end of the rock road to the city of Cape Girardeau?
A. Yes, sir, I know considerable about it.
Q. Tell us what you know about it?
A. I was the engineer in charge of completing part of it and in charge of the entire construction of part; part of it had been done and the work stopped, it was in '69, in '70 when we took work on the railroad it was right close by and I saw it a great deal; some of the work had been done between the end of the old levee and Cape La Croix Creek, at least two-thirds and perhaps more than that. In '73 and '74 it was completed to Cape La Croix Creek; I superintended the work, made plans and specifications for all the work and put a bridge across the creek; when we acquired the right of way across Dennis's land to Sprigg Street I also staked that out.
Q. Do you know about what it cost to complete this road?

Mr. DEMPSEY: Let the record show that we object to that as immaterial.

76 A. I think the first contract to complete the road to Cape La Croix Creek was $2300 and the second contract about $1200. The bridge cost about $500 or $600 extra and incidental expenses several hundred dollars.
Q. How much was the old road worth after it had been constructed?
A. I heard it said that it cost about $8,000 about the time we started to complete it.
Q. How much in your judgment did that road cost from the north end of the rock levee to Sprigg street?
A. It must have cost at least $12,000.
Q. What kind of a road across the swamp, a good or bad road—I mean the rock road?
A. It is a good road.
Q. How long has it been that kind of a road?
A. It has been—when I first knew it, which, I think, I crossed it in '67 and it is a good deal better now than I ever saw it.
Q. You have traveled over it largely?
A. Yes, sir.
Q. Did you live on it?

A. I lived right near it on the south end.

Q. Did you state on what side of the old Brown Spring was a little stone spring-house, on what side did this road pass of that spring house?

A. It is east of it, 250 or 300 feet from the spring-house.

Q. Have you any stock in this road or did you ever represent any?

A. Yes, sir I represented stock in it. I was director in the company from '73 on.

Q. Do you know what dividends you collected on it?

A. I don't know; a good deal of the time none at all. I have heard some people say that the stock, that it had averaged 4 per cent., but I couldn't see it that way.

Q. How long have you had this stock or represented it?

A. From '73 on until last spring, I believe, when I transferred it.

77 Q. Can you now state how many years during the time of your ownership of this stock that you didn't get any dividends at all?

A. I don't know, I should say none at all for 7 to 10 years. Everything that was made out of the road collected as toll went into the betterment of the road and maintaining the road; it is an expensive road to maintain and the fact of the distance of hauling materials, of the river going across it——

Q. (Interrupting:) How must it be kept up?

Judge BURROUGHS: I object to that. I will say for the benefit of the other side that we do not propose to contradict the testimony of Mr. Houck as to how it should be kept up.

By the COURT: I will permit him to offer his testimony.

Q. Where do you get the stone that is required to keep this road in condition and how do you get it?

A. Some of it has been quarried on the hill on the north next to the swamp and some on the south—some macadam broken by hand and a good deal also of flint dressing; that was hauled two miles to the nearest point on the road; that makes it five or six miles to the longest part. At one time we got cars of gravel, and got the railroad company to haul it 60 or 70 miles and dump it at the crossings and loaded it into wagons and hauled it up and down the road.

Q. State if it could have been kept up in any way except by hauling and putting stone on it?

A. No, sir.

Q. And the stone that goes on that road must be hauled from two to three or four miles?

A. Yes, sir, some of it.

Cross-examination by Mr. DEMPSEY:

Q. You live at the lower end of the rock levee road?

A. Yes, sir.

Q. On what road do you live?

A. On the road from Cape Girardeau to Kelso or Benton.

Q. State whether or not this is a main road leading from
78 Benton to Cape Girardeau?

A. Yes, sir.

Q. How do you go from your house to Jackson?

A. Go across the old rock road and from the end of that to Jackson. You strike—leave the rock road at the end of the old rock levee and go west of the north branch.

Q. By what name is that road known?

A. Jackson and Benton road.

Q. Is there any road construction going on now on this Jackson and Benton road from the lower end of the rock levee at the present time?

A. No, sir.

Q. That road is in the same condition that it has been in the last three or four years?

A. Yes, sir.

Q. Is there any road being constructed from the south end of the rock levee at the present time leading in a southerly direction?

A. No, sir.

Mr. Gibney Houck: We now offer certified copies of the County Court of Cape Girardeau and Scott Counties, first of Cape Girardeau County—first proceedings dated on the 6th day of September, 1854, marked Exhibit 19:

"It is ordered by the Court that the sum of One Hundred dollars out of the Road and Canal fund of this county be appropriated to build a bridge at the levee on the road from Jackson to Benton, and that Benjamin Wolf be appointed Commissioner to build said bridge."

We next offer a certified copy dated the 19th day of February, 1855, of the Cape Girardeau County Court marked Exhibit 20.

"Benjamin Wolf, who was at the August Term, 1854, of this Court appointed Commissioner to build a bridge at the levee on the road from Jackson to Benton comes and reports that he repaired the old bridge and expended the sum of Forty-seven dollars; It is therefore ordered, that the Treasurer pay said B. Wolf the said
79 sum of Forty-seven dollars out of the Road and Canal Fund, and that the balance of said appropriation of $100.00 heretofore made being $53.00 be rescinded, and it is further ordered that said Commissioner be discharged."

We next offer an order of the County Court of Cape Girardeau County dated the 22nd day of May, 1855, marked Exhibit 21.

"A petition signed by a number of inhabitants of this County praying this Court for an appropriation to make a ditch through the swamp at or near the Cape Girardeau and Scott County Macadamized road is read and presented to the Court; ordered that the same be filed."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County, dated the 9th day of June, 1846, marked Exhibit 22.

"Ordered by the court that William Johnson, Hiram L. Sloan and Edgar Mason, be appointed Commissioners to view and mark

out a Public Road, leading from the City of Cape Girardeau by the way of Andrew Giboney's lane to Cape La Croix bridge on the road leading to Commerce, Scott County, Missouri: And that they make and certify a copy of their proceedings to the next term of this Court."

We next offer a certified copy of the proceedings of the County Court of Cape Girardeau, dated the 19th day of August, 1846, marked Exhibit 23.

"Ordered by the Court that Madden J. Looney, be appointed Overseer of the road leading from Jackson to Cape Girardeau, on division No. 4, commencing at Cape La Croix Creek and ending at the corporation line of the City of Cape Girardeau to serve for one year and until another is appointed."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 11th day of May, 1848, and marked Exhibit 24.

"Now at this time comes Andrew Giboney, and presents a
80 petition signed by at least Twelve Householders of the Township of Cape Girardeau, Three of whom are of the immediate neighborhood below designated, praying the Court to appoint Commissioners to view and mark out a Public Road from the City of Cape Girardeau by the way of Andrew Giboney's lane to Cape La Croix bridge on the road leading to Commerce in Scott County, Mo. Said petition being publicly read, and proof of notice, of such intended application as by law required having been made, it is ordered that said petiton be filed."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau *of Cape Girardeau* County dated the 21st of May, 1844, marked Exhibit 25.

"Ordered by the Court that Peter Byrns be appointed overseer of road division No. 5 on the road from Jackson to the Big Swamp commencing at Simeon English's house and ending at the middle of the Big Swamp in place of Benjamin Wolf, resigned. It is further ordered that he apply to Moses Block for his allotment of hands."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 31st of August, 1837, marked Exhibit 26.

"Ordered by the court that Maximillian Horrell, and Moses McLean be appointed commissioners on the part of this county to cooperate with the commissioners of Scott County to contract for building a bridge near the mouth of Cape La Croix Creek."

Defendant next offers a certified copy of an order of the County Court of Cape Girardeau County dated the 31st day of August, 1837, marked Exhibit 27.

"Ordered by the court that the order heretofore made appropriating one hundred and fifty dollars to build a bridge near the mouth of Cape La Croix Creek be and the same is hereby rescinded and the court now appropriates two hundred dollars for that purpose provided Scott County will appropriate out of her three per cent. fund
81 one-third of said amount for the building said bridge, all of which is ordered to be certified to the Scott County Court."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 8th of August, 1835, marked Exhibit 28.

"John C. Watson, Aaron Painter and James P. Fulkerson, commissioners appointed to view and mark out a road from the town of Cape Girardeau to the mouth of Cape La Croix Creek, where the State road crosses the same, come and present their report which is approved by the court and the Clerk of this court is hereby ordered to publish said report together, with the petition, according to law."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 5th day of August, 1835, marked Exhibit 29.

"Ordered by the Court that one hundred and fifty dollars of the three per cent. fund be appropriated to the building of a bridge across Cape La Croix Creek where the State road crosses said Creek and the court appoint Maxmilliam Horrell and Thomas Johnson commissioners to superintend the building of said bridge to draw the money from the treasury and appropriate the same accordingly."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 15th of June, 1835, marked Exhibit 30.

"Ordered by the Court that John C. Watson, Aaron Painter and James Fulkerson be appointed commissioners to view and mark out a road from the town of Cape Girardeau to the mouth of Cape La Croix Creek where the State road crosses the same and report their proceedings at next term of this court."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 21st of March, 1835, marked Exhibit 31.

"An appropriation of One hundred and fifty dollars having been made for the purpose of erecting a bridge across Cape La Croix Creek, provided Scott County Court would concur and appropriate the sum of $75.00 for the same object. It is now ordered made by this court that unless the County Court of Scott County does concur in said proposition and make the requisite appropriation at its next term, then said order to be null and void, and this court will appropriate said money for the improvement of some other point."

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Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 18th day of March, 1835, marked Exhibit 32.

"On petition it is ordered by the court that the sum of One Hundred and fifty dollars of the 3 per cent. fund be appropriated, provided the County of Scott will appropriate the sum of $75.00 for the purpose of erecting a bridge across Cape La Croix Creek where the State road crosses said creek, the abutments to be erected of stone and the court appoints Max. Horrel and Tom. Johnson to be commissioners for the county of Cape Girardeau to confer with commissioners of Scott County, if appointed, and to construct, contract for the building and to pay out said amount and to let out the contract for building the same to the lowest bidder; and it is further ordered by

the court that a copy of this order be certified to the County Court of Scott County for its concurrence."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 22nd of March, 1834, marked Exhibit 33.

"Ordered that Sam Rister be appointed overseer of road division No. — in Cape Girardeau township, commencing at Cape Girardeau and running to the middle of the Big Swamp (on the road from Benton to Cape Girardeau)."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 22nd of July, 1833, marked Exhibit 34.

83 "On petition it is ordered by the court that John C. Watson, James P. Fulkerson, Moses Block, Joseph English and Aaron Painter be appointed commissioners to view and mark out a road from Cape Girardeau along or near the bank of the Mississippi River to or near the mouth of Cape La Croix Creek and that they report their proceedings at next term of this court."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 15th day of June, 1829, marked Exhibit 35.

"Ordered on petition that the road from the town of Cape Girardeau to Davis Mill or so much thereof as runs from the top of the hill where the present road to come into said town by George Henderson's to intersect the road leading from the town of Cape Girardeau to New Madrid be declared to be a public road, and that Simeon English be appointed overseer thereof to serve for one year or until another be appointed."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 18th of December, 1828, marked Exhibit 36.

"The order of Scott County Court requesting this court to appoint a commissioner for the purpose of repairing the bridge across Cape La Croix Creek in conjunction with Scott County, according to the Act of Assembly in such cases made and provided, being by the court examined it is ordered by the court that John Baldwin of Scott County, be appointed commissioner for the purpose of repairing said bridge if practicable and if not, then to build a new one and that a copy of this order be certified to Scott County for concurrence."

Defendant next offers a certified copy of the proceedings of the County Court of Cape Girardeau County dated the 23rd of July, 1828, marked Exhibit 37.

"Ordered that Benjamin Carpenter be appointed overseer of road Division No. 13 in the township of Cape Girardeau, commencing at John Cross' mill on the road to New Madrid and running to

84 the county line at the bridge on Cape La Croix Creek. To serve for one year or until another be appointed."

Mr. HOUCK: Then follows the following orders from the Scott County Court, May Term, 1851, 7th day, marked Exhibit 38.

"Ordered by the Court that Thomas H. Price and William H. Nunn be allowed the sum of thirty dollars for building bridge across

Cape La Croix Creek, to be paid out of the Internal Improvement fund of this county, and that the clerk of this court draw a warrant on the Treasurer of this county accordingly."

Defendant next offers an order made by the Scott County Court at the regular October term, 1856, 27th day of the month, marked Exhibit 39.

"Ordered that Miles and Taylor be appointed overseer- of road district Fifteen, commencing at the residence of Charles Moore in Kelso township and extending to the toll gate at the Macadamized Levee on the Big Swamp."

Defendant next offers an order of the County Court of Scott County made at the regular October term, 1848, 2nd day of October, 1848, marked Exhibit 40.

"Ordered by the Court that Coatsworth P. Willborn be appointed Commissioner to superintend the necessary repairs required to be done on the bridge across Cape La Croix Creek, and that he cause said repairs to be done on so much thereof as may be within the County of Scott, and that the expenses thereof be paid out of the Internal Improvement fund of this County."

Defendant next offers an order of the County Court of Scott County, Missouri, made at the May term, 1850, on Monday, the 10th day of June, 1850, marked Exhibit 41.

"Ordered by the Court that Samuel Rappart be appointed Overseer of road district No. twelve, extending from the Cypress Creek to the lines dividing Counties of Scott and Cape Girardeau.

85 LOUIS HOUCK, witness for respondent, recalled and examined by Mr. SMITH:

Q. I observe that there is a couple of these orders of the County Court of Cape Girardeau County appropriating $100 to be used in building a bridge on the levee on the road from Jackson to Benton. Do you know whether there is any bridge there?

A. When was that order made?

Q. At the February term, 1855, "ordered that Benjamin Wolff expend $47."

A. Well, that order speaks——

Objected to by counsel for relator.

Q. Do you know whether there was any bridge at the levee in 1855 or could there have been any put there?

Relator objects to the form of the question.

Q. Do you know whether there was any bridge at the levee?

A. No, sir, there was no bridge at the north end of the levee or anywhere near there.

Q. Why do you say that?

A. Because I know, I owned that property where the present levee terminates and I know that there was no bridge at that levee.

Q. Where is the nearest bridge to that point?

A. There is a bridge—the nearest place to where there is a bridge at that point is about a mile off.

Q. Which direction and on what road?

A. That bridge is on the Benton road, but it is not at the levee and the Wolff place—I take it from that order that Mr. Wolff's place, by tradition is a son-in-law of English——

Mr. DEMPSEY: I object to Mr. Houck's interpretation of the order. I object to that because Mr. Houck had no knowledge of the condition of that country until 1869 and this order was made in 1855.

By the COURT: I don't understand that he is undertaking to testify to anything that occurred in 1855; he is testifying now that there was no bridge there.

A. The nearest creek or place where a bridge could be con-
86 structed would be from three-fourths of a mile from the end of that line; the country there is very flat, common country at the foot of the hills and the creeks run along the foot of the hills——

Q. How does that road run by the English farm?

A. I own all that old English farm, Simeon English; it extends all along that swamp for nearly two miles in length and more than that and I own it all.

Q. Where does that rock road run in reference to that pond?

A. This rock road runs at the upper end of that place. There was a road running through the English place when I first came into the country which is now my place.

Mr. DEMPSEY: We object to Mr. Houck testifying to what road extended through this country in 1853 and prior thereto on the ground that his testimony shows that he is incompetent.

A. When I came here and first became acquainted with the country a road which was then known as the old Bloomfield road passed what was then Simeon English's place—English lived before that time—that road run through the Simeon English's place and crossed the bridge, went between my place and crossed the bridge over Ramsey creek and then went up between my place and the Cross place and turned across through the woods, a part of the land you now own (addressing Judge Burroughs), the whole bottom was in woods, went directly over the old Cross Ford and when I came into the country that road was washed in by the river and there was a bridge across Cape La Croix—of course this is only my idea that this order relates to this road.

Cross-examination by Mr. DEMPSEY:

Q. There is a bridge to-day at or about the middle of the present rock levee road?

A. No, sir.

Q. On the rock road between Cape Girardeau and the Scott County Bluffs?

A. There is a bridge over Cape La Croix Creek half a mile away.

87 Q. We are speaking of between the Bluffs of Cape and Scott counties?

A. There is a bridge that I built myself.

Q. Now, so far as you know there might have been in 1855 a bridge at or on some point along what is now known as the rock levee proper?

A. There is no possible information to show the fact. It is only by stretching of language that I know there was a bridge there, what we have there is properly culverts on the rock levee road, two of them not more than 8 feet wide and this arched bridge I suppose is 10 feet.

Q. You have heard of the term channel of the Big Swamp?

A. Yes, sir.

Q. That has been used as a dividing line of Cape Girardeau and Scott County?

A. Yes, sir.

Q. When you first became acquainted with this country was there any state road established at or near the north end of the rock levee at the——

A. Yes, sir, that ended on the north end of the Jackson and Cape Girardeau road.

Plaintiff admits that Cape La Croix Creek is the dividing line between Cape Girardeau and Scott Counties, near the mouth and for some distance back from the Mississippi River.

R. G. RANNEY recalled and examined by Mr. Smith:

Q. Mr. Ranney, how near the north end of this levee were you raised?

A. About two and a half or three miles.

Q. You have been familiar with that territory all your life?

A. Yes, sir.

Q. You remember of ever seeing the remains or wreck of an old bridge in that vicinity or near the rock levee?

A. Yes, sir.

Q. Tell the Court when you saw it and where it was located with respect to the road that is in question.

A. I saw that bridge, that is the two bents of an old bridge that I suppose had been a bridge in the bed of what appeared to be a bed of a creek, which I suppose was originally the bed of Ramsey Creek, in 1873 for the first time.

Q. In what condition were these bents?

A. They were almost decayed, nothing there except two bents in the creek about 25 or 30 feet apart.

Q. State to the Court whether this bridge was on a line with the present macadamized road or how was this bridge situated with reference to this road?

A. It was almost due west from the north end of the rock levee road, but it was in line; it was on what appeared to be an old road, but it wasn't through at that time; there was a road leading from that point where these bents were north and intersected what we know as the Jackson and Benton road about one-half mile from there north.

Q. Is that the only remains of a bridge you saw?

A. That is the only bridge down there. Further north from the north end of the road there was another bridge.

Q. State, Mr. Ranney, what direction it was from the old Wolff place?

A. It was right at the old Wolff place; it was a little south of east of where the old Wolff house stood on top of the hill.

Q. You are by profession a lawyer?

A. Yes, sir.

Q. I will ask you if you made any examination of the records of the County Court of Scott County and if you made any, tell the Court the character of that examination in search for an order showing the consent of the County Court of Scott County or Cape Girardeau County for the old Cape Girardeau and Scott County Macadamized Road Company to take possession of and occupy any public road running across the Big Swamp?

A. I did.

Q. What kind of an examination did you make?

A. I made a thorough examination in both counties, beginning at the very beginning of the records in both counties and searched the records page by page, up to the time of the organization of our company.

89 Q. What did you find?

A. I found no consent by the county court of either county.

Q. Did you search these records up to as late as 1856?

A. Yes, sir, I did.

Q. Well, did you find any petition for a county road or application from the Cape Girardeau & Scott County Macadamized Road Company to the County Court at that time?

A. I didn't search for the petition myself, but I had the Clerk or Deputy Clerk in Cape Girardeau to search for the petition and the Clerk of Scott County to search and they could not find any.

Q. I understand that Mr. Giboney was your uncle?

A. He was a great-uncle of mine.

Q. He and your father were stockholders in this road?

A. Yes, sir.

Q. And you have been familiar with this road property practically all your life?

A. Yes, sir.

Cross-examination by Mr. DEMPSEY:

Q. How far was this old bridge that you speak of from the north end of the rock levee?

A. It may be a quarter of a mile and it might not be that far, not over that.

(By the COURT:)

Q. Let me understand the point that is meant by the north end of the rock levee; you mean the point on the straight line of the road indicated on the map running toward Jackson?

A. Yes, sir.
Q. You don't mean the end of the toll road to Cape Girardeau?
A. No, sir, that part of it was built first.
Q. You mean the levee?
A. That was the part we called the levee.

(Mr. DEMPSEY:)

Q. It is well known generally as the rock levee?
A. Yes, sir, people call it the rock levee.

Defendant desires to offer the deposition of Mr. L. B. Meyers, marked Exhibit 42.

L. B. MEYERS, of lawful age, being produced, sworn and examined the part of the defendant, deposeth and saith:

Direct examination:

Q. You may state your name, age, and place of residence?
A. L. B. Meyers, aged 78 years, Sikeston, Mo.
Q. How long have you lived in Scott County?
A. I have always considered it my home since I was 11 years old, t I was away from 1850 to 1870.
Q. In what part of the county did you live from the time you was years old to 1850?
A. I lived east of Benton on the Commerce road.
Q. Were you acquainted with the road from Benton to Cape Girar- u, and to Jackson?
A. Yes, I carried the mail from the time I was nine until I was 13 rs old, and passed over the road twice each week, from Benton to kson and return, passing through Cape Girardeau.
Q. Please state at what point you crossed the Big Swamp?
A. Sometimes by way of the levee, and sometimes I followed the t hills of Scott County about one mile east of the rock levee, and n turned north across the swamp. *In bad weather the latter ued route was the most travelled by people going from Scott unty to the Cape.*
Q. Were there any other roads that you know of at that time ssing the swamp from Scott County to Cape Girardeau, or to kson?
A. None that I remember, I don't think there were any.
Q. Do you know who opened this road called the levee?
A. I do not.
Q. Did you ever see anybody working the said road?
A. I never did.
Q. Do you know whether anybody was ever warned to work the road?
A. I do not.
Q. What was the condition of this levee road when you e carrying the mail and afterwards?
. It was very bad in winter and spring, nearly impassable. It as straight as it is now, and as wide as it is now, or about it, and ed about as it does now.

Q. I will get you to state whether or not during the time you carried the mail, and at any time thereafter up to 1853, the levee road was regularly worked at intervals, and kept in repair?

A. To my knowledge it never was, I don't recollect of it being ever worked. I have seen signs of it having been worked on, and bridges repaired, but I don't know who did it.

Q. What was the character of those bridges?

A. There was some narrow bridges from ten to twenty feet, and planked over with either plank or slabs.

Q. Please state whether or not there were a good many by-roads?

A. There were some dim bridle paths, there were no other roads cut out, but people traveled these paths because the levee was so bad they could not travel on it, and they were traveled by people on horseback and in wagons.

Q. How did you go from the north end of the levee to the Cape?

A. There were two ways, one went straight out north to the John Cross place, where it struck the Bloomfield road, to where it led out to the Cape. The other way was from the north end of the levee turned east under the bluff.

Q. To refresh your recollection after going along under the bluff, say a quarter of a mile, did you then go up over the bluff?

A. No, I think not.

Q. Can you tell us where you crossed that creek in going in on the bluff road?

A. I don't recollect where, I don't remember where.

Q. Did the other road that ran along the Scott County hills cross Cape La Croix Creek?

92 A. Yes, it crossed the creek, a little below Lorimier's mill by a ford.

Q. What was the condition of that eastern road, along the Scott County hills?

A. It was just a common road, like any other country road. It crossed Cape La Croix Creek a little below Lorimier's mill by a ford, I think it was Lorimier's mill.

Q. Do you know whether that road was ever worked by the county or not?

A. I do not.

Q. How did this last named road compare with the levee road?

A. It was a great deal better than the levee, in bad weather the levee could not be traveled at all.

Cross-examination:

Q. Did this eastern road run straight across the swamp, after leaving the Scott County hills?

A. It meandered around to get on the best ground, but its general course was straight across.

Q. Was its right of way cleared out, or did it wander between the trees?

A. It generally wandered between the trees.

Q. Was its road bed thrown up, or was it level with the rest of the swamp?

A. It was level with the rest of the swamp.

Q. Did it have any bridges?
A. I don't recollect of any bridges.
Q. How wide was the levee itself?
A. It was wide enough for two wagons to pass.
Q. How high was it above the level of the swamp?
A. Between three and four feet higher than the level of the swamp.
Q. Did it have ditches on both sides of the levee?
A. Yes.
Q. About how wide was the whole right of way cleared out?
A. I think from fifty to sixty feet.
Q. After you quit carrying the mail until 1850, how often did ou cross the swamp?
A. I guess about ten times a year.
Q. These bridle paths you speak of, did they leave the levee and run along through the woods, and come back to the levee gain further along?
A. Yes, generally they did.
Q. In good weather did you drive on the levee itself?
A. In good, dry weather we drove on the levee itself, but even then here were some bad holes we would have to go around.
Q. In bad weather you sometimes used these bridle paths for roads, nd sometimes used what we are calling the eastern road?
A. Yes, sir, but we used the eastern road more than we did the her in bad weather.
Q. Was the levee road known by any other name?
A. I never heard any other name for it.
Q. Was it not called sometimes the big swamp road?
A. I don't think it was, it was generally known as the levee across e big swamp.
Q. Was it not a part of what is sometimes called the Jackson nd Benton Road?

Objected to by the defendant.

A. It was.
Q. In going from Benton to Jackson without going by way of the ape was it necessary to go along this levee road?

Objected to by the defendant.

A. To save time and mileage it was necessary to cross the swamp the levee.
Q. Do you know where was the English place?
A. Yes, it was about a mile or a mile and a quarter north or rthwest of the levee, the north end.
Q. When did you go over this levee road the last time?
A. I think it has been six or seven years since I crossed it.
Q. Is that part of it across the swamp, located the same as it was hen you carried the mail?
A. I think it is.
Q. How does that part of the road, leading from the north end of the levee under the bluffs to the Cape, compare with that part of the road when you carried the mail?
A. I did not go that way the last time I went.

Q. When did you last go over that part of the road?

A. I think about eight or ten years ago.

Q. How did it then compare as to location with the same part of the road when you carried the mail?

A. It seemed to me the general location was the same, it is a much better road now, there may have been some changes, but the general direction is the same.

Re-redirect examination:

Q. Was this road under the bluff leading from the levee graded or thrown up when you were carrying the mail or up to 1850?

A. I think not.

Q. At what point does that road come into Cape Girardeau?

A. At the southern side, but I don't recollect that it struck any other road.

Q. Was there any other road leading from Benton to Jackson besides this levee road?

A. None that I knew of.

Q. When you say that the levee road was a part of the road leading from Benton to Jackson, do you mean to say that it was opened and made a road at the same time that the road from the north end of the levee — made a road and opened, or do you mean to say that the levee road connected with the road to Jackson from the north end of the levee?

A. These roads that we have mentioned were all in existence at my earliest recollection. I know nothing about them of my own knowledge, but my opinion is that the levee was built afterward to connect the road in Cape County and the road in Scott County.

(Signed) L. B. MYERS.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

[SEAL.] A. A. HARRISON,
Notary Public.

Defendant next offers deposition of Joseph H. Moore,
95 marked Exhibit 43.

JOSEPH H. MOORE, of lawful age, being duly sworn and examined on the part of the defendant, deposeth and saith:

Direct examination:

Q. You may state your name, age and place of residence?

A. Joseph H. Moore, age 67, my residence is Commerce, Mo.

Q. How long have you resided in Scott County?

A. Sixty-six years.

Q. Were you familiar with the roads in Scott County leading from Scott County to Cape Girardeau and Jackson across the big swamp prior to 1848?

A. As a boy, we hauled wheat to Cape Girardeau, from my father's home, which was four miles from the swamp, and traveled the roads frequently.

Q. Was there more than one road across the big swamp at that ime?

A. There was a road across Cape La Croix Creek, where it went nto the Mississippi river and up the river bank to the town of Cape Girardeau, and at nearly all seasons of the year was a good road, eing on the ridge in the hills, and on the bank of the river in the wamp, there was another road leading from the foot of the hill at he east end of the levee to near what is known as the Peter Holler lace, then crossing the swamp by the Priest farm, or College farm, rossing Cape La Croix Creek a quarter of a mile more or less east f the hills in Cape Girardeau County, this last road after crossing road leading from the north end of the levee to Cape Girardeau, here was a third road leading from the Scott County hills across the wamp to the Cape Girardeau County hills, about three miles in ength, in hauling wheat to the Cape we always went around by the ld Sim English place, there was a road leading from the north end f the levee under the bluffs, but it was through the edge of the wamp a good ways, and full of holes and impassable places, here is a macadamized road now from the north end of the levee to the Cape; my recollection of the macadamized road is not for 6 the most part on the old road bed, but gets up closer to the bluff, and after it crosses the La Croix Creek, the macadamized oad goes nearly straight to the Cape, while the old road meandered o the northwest. From the south end of the levee there was a road unning east under the bluff of the Scott County hills, which con-ected the middle road across the swamp, near the Heller place, that oad was good with some bad places in it, and those places were cov-red with brush and dirt and rock thrown on brush on account of oles, a great many would drive out in the woods to avoid the holes. fter the corduroy was put there it was fearfully rough and the sap ils soon rotted, and made the road worse than ever in places.

Q. Did Doctor Brown, because the road was in such a miserable ondition, with his oxen sometimes drag people's wagons through he swamp at this place and charge them $2.50 to $5.00 for so doing?

A. Many people told such stories to us, we lived on the public oad, they sometimes camped near our house, and told the above ories.

Q. Was the first road you speak of along the river more traveled y the public, than this road across the levee?

A. A great many people traveled on the river road. I can't say ow many traveled the levee road, we did nearly all of our traveling n the river road until it fell into the river, the levee road got very ood at some seasons of the year for horseback traveling, but I never aw it in good condition for wagons; there were holes in it all the ear around.

Q. As compared at the north end, did that road lie to the present ck levee road, was the terminus at the same place, was it east or est of the present terminus, or did it fall short of the present rminus turning toward Cape Girardeau, or to some other point?

A. I think it varies from the old road bed a little at the north end little nearer the Cape.

Q. Did the road or roads leading from that point to the Cape vary from the present location of the road to the Cape?

A. I think the old road was a little farther down in the
97 swamp.

Q. Was there another road over the hills or around the hills to the Cape?

A. There was another road around the hill by Sim English place to the Cape.

Q. Was you or your father ever warned to work this road?

A. I was not, I don't know as to my father.

Q. What is your profession?

A. I am a lawyer and a farmer, I have been a surveyor and had a great deal to do with the roads of the County, but not before 1855.

Cross-examination:

Q. Did you move away from that road district before you were of age?

A. I was 21 years old when I left home, four miles from this levee.

Q. At the times you speak about not being warned was your father above the age for working the road?

A. Yes.

Q. With all its defects, holes, etc., this levee was in fact a public road and traveled as such?

Objection by defendant.

A. I never heard of it being a public road, but the public traveled it.

Q. How wide was it cleared out?

A. It was at least cleared out 40 feet wide, there was room on the levee for two wagons to pass, and small ditches on each side of the levee; the dirt was taken from these ditches and thrown on the corduroy at the time the corduroy was put there. Doctor Brown cut some of those ditches to drain his farm. The bushes were growing on the side of the road 10 or 15 feet high.

Q. How high was the levee?

A. Would average a foot and a half high.

Q. Do you wish to leave the impression that either Doctor Brown or Mr. Giboney or both cleared out the whole right of way for the whole length of the levee, built the levee, dug the ditches,
98 built the bridges, and maintained such repairs, as were made?

A. My impression is that the levee was cut out a great many years ago, at least thirty years before I was born. I never saw a stump on the right of way, who cut it out of course I don't know, the river road was the first road that was traveled, this road was cut out no doubt as soon as the land office was opened at Jackson; it was nearer over that road to Jackson for the most of the people in Scott County.

Q. Did this levee road have any bridges?

A. It had several small culverts, but no bridges of any size, after-

ards a rather large bridge was built on the road about the middle of
ie swamp.
Q. From the south end of the levee did the road lead direct to
enton?
A. Yes.
Q. From the north end of the levee did a road lead direct to Jack-
n?
A. Yes, sir.
Q. Was the whole road from Benton to Jackson going over this
vee called the Jackson and Benton road, or the Benton and Jack-
n road or both?
Objection by defendant.
A. I think it was called the Benton and Jackson road, sometimes
lled the Jackson road over the levee.
Q. Was this road ever called the big swamp road, or road across
e big swamp or both?
A. I think it was, and sometimes the levee road.
Q. When was the river road abandoned?
A. About 43 years ago.
Q. When, if at all, was the middle road by the College farm aban-
ned?
A. It has never been abandoned but changed somewhat at the
rth end.
Q. Is it not necessary in going to the Cape by the middle road to
at least a mile and a half on the present rock road to get to the
pe?
A. Yes, sir.
Q. In other words the upper terminus of the middle road is at a
point on the rock levee road about a mile and a half or two
miles from the Cape?
A. Yes, sir.
Q. How far east of the levee road was the river road?
A. It was three or four miles.

Redirect examination:

Q. You speak of a large bridge being built near the middle of
e levee road?
A. It was not a large bridge, I don't remember by whom it was
ilt.
Q. Did you ever travel the road from the north end of the levee
Jackson?
A. Yes, sir, I went there when I was 12 years old.
Q. From personal observation you don't know anything of that
d previous to 1848—from the north end of the levee to Jackson?
A. No.
Q. When you speak of the levee road across the big swamp, as
ng part of the Benton and Jackson, you mean after 1848?
A. I knew scarcely anything about the road from Benton to
kson until after 1857.
Q. In the forties there were three roads?
A. Yes.

Q. Was the road along the river the first road you speak of a County road?

A. I do not know, I think the County built a bridge across Cape La Croix Creek, it was a very long bridge.

Q. Was the second or middle road you speak of a County road?

A. I think not.

Q. Was the road leading from the south end of the levee eastward, a part of the middle road, or did it connect with the first road along the river?

A. It connected with the middle road.

Q. Was any part of the swamp fenced between the levee and the river?

A. There was no fence in Scott County in the swamp from the levee until near the bank of the river, people drove almost any
100 where they please-, you could see wagon tracks almost any where.

Q. Where did the third road that you speak of begin on the Scott County side, east or west of the present terminus of the said road?

A. About the same place.

Q. Was that road a County road?

A. I never heard of it being a County road.

Q. Was it ever worked by the County?

A. Not that I know of, I remember when I was a small boy about 12 or 13 years old in company with my father, of meeting Doctor Brown, and Andrew Giboney, who were having the road corduroyed with rails, the conversation commenced about making a macadamized road, and charge toll as they did in Kentucky.

Q. Were there some negroes working there?

A. There were men working there and I think they were negroes.

Q. Was Doctor Brown a large land holder in the big swamp in the neighborhood of the levee?

A. I have learned since that he was.

Q. Did Andrew Giboney own land in the swamp at that time near the levee?

A. Doctor Brown owned the land at the south end of the levee, and Andrew Giboney owned the land at the north end of the levee.

Q. What was the general condition of the levee road at that time?

A. It was a miserable makeshift for travel, or wagon, would go up to the axle.

Q. Do you know this road was called the Benton and Jackson road before 1852?

A. I do not.

Q. Were not the three roads that you describe as crossing the big swamp spoken of as the roads across the big swamp?

A. They were, when I was a boy.

Recross-examination:

Q. In 1848 you did go from the north end of the levee to Jackson over the Jackson and Benton road?

101 A. Yes, sir.

(Signed) JOSEPH H. MOORE.

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

A. A. HARRISON,
Notary Public.

Defendant next offers the deposition of Emily Brown, marked Exhibit 44.

EMILINE BROWN, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

Q. State your age, Mrs. Brown?
A. I will be 67 the 9th of April.
Q. Your place of residence, where do you live?
A. Here in the Cape. I was born and raised here near the Cape.
Q. Were you familiar with the Big Swamp before the war?
A. Yes, sir, I don't know anything since the war, but I know all about it before the war, because that was my home.
Q. Do you remember a road leading from Dr. Brown's across the Big Swamp and then over the hills to Cape Girardeau before the War?
A. Yes, sir, I remember that well.
Q. Is that road where the Rock levee is now?
A. I suppose so, I have not been down there since the war. I can't tell anything since the war. This was before the war I lived there.
Q. Was there a road leading from in front or near Dr. Brown's residence?
A. What we called a hog path.
Q. Across the swamp?
A. Yes, sir.
Q. Was that when Dr. Brown first lived there?
A. Yes, sir.
Q. Did Dr. Brown build a road after he moved there?
A. He did. He and Uncle Josh and John and old Uncle Frank Ancill.
102 Q. What did they do?
A. They dug the road and hired oxen and hauled these ties like on the railroad, they laid them there and ditched the road, cut out all this little growth to make that road. Those men worked there I don't know how long. Miss Amanda Brown and I used to run up and down those trenches.
Q. Before that time how did they cross the swamp?
A. They didn't have but a small path then. We used to come across there, but when it rained we could not get across.
Q. Was there much travel across there then?
A. Very little. Mr. Ancill's folks used to cross and some of the Scott County people, very few of them.
Q. When Mr. Brown cut that road out did he cut it out straight?
A. Cut right straight to the hills, two miles and laid those puncheons.
Q. And before that time there was nothing but hog paths?
A. That was all, we called them hog paths.

Q. Before that time was there an embankment of any kind, a dump thrown up?

A. Nothing done. Nothing but a sea of water.

Q. Was there any other road at that time?

A. Some of them said there was a road to go out by Scott County but I don't know nothing about that road. I never seen that road.

Q. Did Mr Brown ever with his oxen or with his horses haul anybody across that road who stalled?

A. Yes, many a time he had to go with his oxen. Mr. Ancill' wagon would get stalled about half a mile from the house and Uncle Josh would pull them out.

Q. Did he sometimes charge people $2.00 or $2.50 or $5.00 who started across the swamp with their wagons and stalled?

A. I don't know anything about that.

Q. How wide about did he cut out the road?

A. Just wide enough for one wagon.

Q. He cut it out wide enough for one wagon?

103 A. Yes, sir.

Q. How wide a dump did he throw up?

A. I don't remember nothing about it. I know they made a big ditch and threw up enough in the road for a wagon to cross on these logs.

Q. Was the dump wide enough for two wagons to cross?

A. No, sir, you know we could see across and the other wagon would have to wait until they got across.

Q. Then, as I understand you, two wagons could not pass?

A. They could not in muddy weather, but in dry weather they could by going into the woods.

Q. And people did drive off in dry weather?

A. I guess they did, but in muddy weather they could not.

Q. So if a wagon was crossing and another wagon was at one side or the other of the swamp about to cross, it waited until the wagon crossing got out and it would start?

A. Yes, sir, they had to do it.

Q. Because the *fever* was the only place on which they could cross?

A. Yes, sir.

Q. Was that Mr. Brown's private road?

Objected to as calling for a conclusion of the witness.

A. Yes, sir.

Q. Who did Mr. Brown build that road for?

A. Himself. That was his own down there.

Q. He never was paid anything for building that road?

A. I could not tell anything about paying. We children didn't know much about that as we do now. We never heard anything about paying.

Q. You never saw any strangers there working on the road with Mr. Brown?

A. Not while we were down there.

Q. He built the road with his own men and with the men of Mr Ancill?

A. Yes, sir.

Q. And his people and Mr. Ancill's people were about the
104 only people who traveled the road at that time?
A. Yes, sir.
Q. How old about, then were you?
A. I don't know exactly how old I was. I was older that Miss Althea was.
Q. Was this 10 years before the war?
A. I could not tell you.
Q. It was long before the war?
A. Long before the war. We were just little bits of tads then.
Q. Where did the north end of the road or the end of the road towards Cape Girardeau come out?
A. We used to call it above Mr. Cross's farm, there at the foot of the big hill.
Q. Did it come out at the foot of a hill?
A. Yes, sir.
Q. How did you go then, did you go up the hill or around the hill?
A. Had to go up the hill until they cut it.
Q. How then did you come into Cape Girardeau, do you remember through whose place?
A. I can not remember exactly, but here through Mr. Bodeans.
Q. Did you cross Cape La Croix Creek?
A. Yes, sir.
Q. Did you cross by a ford?
A. Yes, sir.
Q. There was no bridge?
A. No, sir, no bridge, just rock bottom.
Q. Did you go up the creek then?
A. Come right across.
Q. Do you remember a road on this side of the swamp along the hills through the swamp to Cape Girardeau?
A. No, sir, I don't remember anything about that.
Q. At that time did you ever hear this road across the swamp called the Jackson and Benton road?
A. No, sir, they had another road they called the Benton road that ran out by Conran's.
Q. Did you ever hear this spoken of as Dr. Brown's road?
105 A. Used to call it that all the time.
Q. Do you know where the levee is now?
A. No, sir, I have not been there since the war.
Q. Did the north end of this road come at Mr. English's place?
A. No, sir, it come out that way, we had to go through Mr. English's land to go out to the Benton road.
Q. Did that road run northeast across the swamp, straight northeast or rather northeast across the swamp?
A. It come exactly from the levee back by Mr. Cross's field to that hill and then crossed the creek north to the Cape. There was all woods. There was no farms along there except Mr. Cross's and that was on the right hand side.
Q. There was no road running straight from Mr. Brown's house across the swamp except that?
A. No, sir, there was not and his colored men made that.

Q. Was there a stone spring house near Mr. Brown's house?

A. The spring house was in the yard right straight down from the kitchen.

Q. You remember on which side of the spring house the road was?

A. On the north side.

Q. And from the north side of the spring house ran straight across the swamp?

A. Yes, sir.

Q. And there was no other road in that neighborhood that you could see from there?

A. No, sir, there was no other road at all.

Cross-examination by Mr. Dempsey:

Q. How old were you when the war was started?

A. I don't know, Mr. Dempsey.

Q. Were you a grown young woman?

A. No, sir, I don't remember about my age because I only learned it about two years ago.

Q. Were you born on Mr. Brown's place?

A. On Robert Giboney's place. They built a house up in
106 town here, a large brick house.

Q. You don't remember how old you were when the war began?

A. No, sir, I don't.

Q. You remember distinctly though about the war beginning and about the happenings at that time?

A. Yes, sir, I remember all of that.

Q. When were you married, before or after the war?

A. Just in time of the war.

Q. It was during the war that you married?

A. Yes, sir.

Q. You spoke of Mr. Brown helping people out along the road with his oxen when they would get stalled?

A. Yes, sir.

Q. Was that before or after he fixed the road.

A. He fixed the road and then it was before that too.

Q. It had been used as a road somewhat before he did this work?

A. No, sir, only by — own family.

Q. Did you come to town with oxen before Mr. Brown fixed the road?

A. Men cut the twigs down.

Q. Are you prepared to swear that nobody but Mr. Brown used that road before that time?

A. And Mr. Ancill.

Q. Didn't some other people?

A. Some few Scott County, but I don't know in particular. They went another road.

Q. Do you know where that other road was?

A. No, I don't. They didn't come up that way at all.

Q. Was there a road leading from Dr. Brown's southward towards Benton?

A. After it passed the house I could not tell you where it went.

Q. It lead that way?
A. Yes, sir, we had to go down to Mr. Ancill's farm, it was about two miles below us.
Q. Were you ever down at Ancill's farm?
A. Yes, sir.
107 Q. Did the road still lead further south, beyond that?
A. Yes, sir.
Q. Do you know of your own knowledge and not speaking now of what people may have told you, do you know of any other road which crossed the swamp excepting this road they called Dr. Brown's?
A. No, sir.
Q. You never went over any other road?
A. No, sir, I never did.
Q. How often, if you remember, did you yourself cross this road?
A. They let us children go down in a wagon.
Q. About how many times did you go over?
A. Once a week and sometimes twice a week.
Q. Between the bluffs in Cape County and the bluffs in Scott County was what is called the swamp?
A. Yes, sir, I guess so.
Q. And it was covered with large trees, was it not?
A. Yes, sir, and small trees.
Q. Heavy timber?
A. Yes, sir.
Q. Do you remember Dr. Brown cutting out any of the large trees on that road?
A. Yes, sir, he did, he had to.
Q. He had to cut out the large trees?
A. Yes, sir.
Q. And you remember how wide he cut the road, that is how wide a swath he cut through the timber?
A. No, sir, I don't remember.
Q. Was it wide enough to allow for more than two wagons to pass between the trees?
A. Not on the levee.
Q. I am speaking of the space between the trees?
A. No, sir.
Q. There was not space for more than two wagons to pass one another on the road between the trees?
A. No, sir.
Q. Was that road known as the levee?
A. Yes, sir.
108 Q. When did you first hear it called that?
A. Mistress used to call it the levee.
Q. How old were you when it was first called the levee?
A. I don't remember, I was a little bit of a tad.
Q. It was called the levee as far back as you can recollect?
A. Yes, sir.
Q. Do you know why it was they called it the levee?
A. No, sir, I don't.
Q. Before Dr. Brown made this clearing and laid these logs was there a straight road cut through the timber to a straight path cut

through the timber from Dr. Brown's house to the bluffs in Cape County?

A. No, sir, there was not.

Q. I am speaking about the timber?

A. There was lots of timber.

Q. Before Dr. Brown made this road I want to know if when he crossed it and the people crossed it, if they could go straight across from Dr. Brown's house to the hills?

A. For two miles.

Q. They could do that before Dr. Brown made these repairs that you speak of?

A. Yes, sir.

Q. And then sometime before that the trees had been cut down along that path?

A. Yes, sir.

Q. Do you know who cut those trees down before Dr. Brown did this work that you have spoken about?

A. I don't, but I guess Master had it done.

Q. As a matter of fact as you can recollect there was a passage across that swamp at that place?

A. Yes, sir.

Q. And that passage was used occasionally by people going back and forth with wagons and horses?

A. Yes, sir.

Q. You spoke of another road as being called the Benton road by Mr. Conran's?

A. Yes, sir.

109 Q. When did you first learn of any such road, how long ago?

A. It was before the war.

Q. Do you know now where that road ran?

A. It forked off just back of Mr. Bodean's there.

Q. This Bodean place is about three miles from the north end of the rock levee, isn't it, between two and three miles?

A. I could not tell you anything about the miles.

Q. It was about half way, wasn't it?

A. It is this same Bodean place.

Q. Isn't it half way between the upper end of the rock levee and the Cape?

A. I don't remember.

Q. It is not near the north end of the rock levee, is it?

A. No, sir.

Q. Was the Conran place near the north end of the rock levee?

A. No, sir, you could not see anything of the Conran place from the rock levee.

Q. Where was Sim English's place with reference to this end of that Dr. Brown's road?

A. Well, Mr. Sim English's place would not come near Dr. Brown's road. I know where we turned off.

Q. Where would you turn off in going to Sim English's place?

A. Cross over Mr. Bodean's place out here.

Q. That was going south?

A. Yes, sir.

Q. Now do you know how you could get to Sim English's place coming north from Dr. Brown's?

A. Only coming up to the Bodean place.

Q. So far as you know there was no way of going to Sim English's place from Dr. Brown's house except by coming up to Bodean's and then going back south to Sim English's?

A. Yes, sir.

Q. You never have known of your own knowledge of any road which led from Jackson down by Sim English's place and
110 across the levee or across the swamp?

A. No, sir, I don't remember any kind of a road of that kind.

Q. Did you ever go from Dr. Brown's to Jackson?

A. No, sir; I come to town.

Q. Never have gone that way in your life?

A. Yes, sir.

Q. Where did you live when you were a child?

A. Dr. Brown's; born at Mr. Giboney's place.

Q. And where was the Giboney place at that time?

A. It was out where it is now, I reckon.

Q. It was on the northwest side of the swamp?

A. Yes, sir.

Q. And it was going from the Brown place to the Giboney place that you had to cross the swamp?

A. Yes, sir, we had to come to town.

Q. You had to come to town in order to go to the Giboney place?

A. Yes, sir.

Q. You never went across the swamp by Dr. Brown's road and to the Giboney place without first coming to the Cape?

A. No, sir.

Q. You don't know of any road that led from the Giboney place or passed the Giboney place and across the swamp which did not come by the Cape first?

A. No, sir, I don't remember any road at all.

Q. Do you remember when they put the rock on this road known as the levee?

A. No, sir, they done that since the war.

Q. You don't know why it was called the levee when you were a child?

A. No, sir, Master called it that.

Q. You never went to Benton in Scott County?

A. No, sir.

Q. Do you know whether there was much travel when you were a very small child across the swamp?

A. Just Mr. Ancill's people and some few people from Scott County.

111 Q. And there was people from up here that crossed it when they had business in Scott County?

A. Yes, sir, I guess they did. We did meet wagons.

Q. But at that time there was not many people living down in Scott County?

A. No, sir, I don't think there was.

Q. Besides Dr. Brown's and Mr. Ancill's what other families did you know on the Scott County side of the swamp?

A. Nobody but Mr. Ancill's and Mr. Cross's.

Q. And how far was Mr. Cross's place?

A. It must have been about four miles from the levee.

Q. Did Mr. Cross use this road once in a while?

A. Not coming to Scott County, he didn't.

Q. I asked if you know who lived in Scott County?

A. No, sir, Mr. Ancill and Mr. Brown.

Q. About how often did Dr. Brown work on that road?

A. They worked once a week, they were working off and on.

Q. Did he work on it every year?

A. Yes, sir, three or four times a year.

Q. You remember seeing him cut down some trees, do you?

A. Yes, sir.

Q. He didn't cut down trees every year, did he?

A. I guess he did.

Q. The trees would not grow up every year, would they?

A. There was so many big trees.

Q. And according to recollection he cut down big trees along that road every year before the war while you lived at Dr. Brown's place?

A. Yes, sir.

Q. And he was working on this road pretty near every week?

A. He was.

Redirect examination:

Q. It was all woods in front from Dr. Brown's house?

112 A. Yes, sir.

Q. When you—before Mr. Brown cut out this road you speak of and threw up this levee you speak of, you could not stand on the south side of the swamp and see across the swamp, could you?

A. No, sir.

Q. Then I understand you to say that after he cut down the trees and threw up this levee you could see across the swamp?

A. Yes, sir.

Q. That when you first came there to live before this road was cut out by Mr. Brown it was all woods and you could not see but a little piece?

A. Yes, sir, his colored men cut the logs to build his house off of the levee.

Q. There were big enough trees then growing on the levee or where he put the levee to use for logs in his house?

A. Yes, sir.

Q. And the levee was wide enough for a wagon to go on after he built it, was it?

A. Oh, yes, sir.

Q. And then there was a ditch on each side of the levee?

A. Yes, sir.

Q. Was it including the ditches 15 feet wide, according to your recollection?

A. I could not tell you anything about the feet or nothing. The logs were hauled with oxen.

Q. How wide were the ditches, if you remember?

A. We could not jump across them good.

Q. There was no levee and no ditches and no road cut out before Mr. Brown came there?

A. No, sir, there was not.

Q. There was no straight path or road leading across the swamp?

A. Only what we called a hog path.

Q. And you could not stand at one end of this hog path and see across the swamp?

A. No, sir.

113 Q. And according to your recollection nobody except Mr. Brown and Mr. Ancill worked on the road?

A. No, sir.

Q. According to your recollection was there much travel?

A. Only Mr. Ancill's folks and sometimes people from Scott County, but I didn't know them.

Q. You didn't know whether there was more people in Scott County then than there are now?

A. No, sir.

Q. There was no other road leading from near the spring house in front of Dr. Brown's house across the swamp?

A. No, sir.

Q. There was no levee there before Dr. Brown put up this levee that you speak of?

A. Nothing but mud and a sea of water.

Recross-examination:

Q. Was there any road that branched off at Dr. Brown's house or near there out towards the river east or towards Commerce?

A. No, sir, only what he cut to the graveyard on top of the hill.

Q. That graveyard is up on top of the hill adjoining Dr. Brown's place and this road to the graveyard did not go beyond the graveyard?

A. No, sir.

Q. When you first knew of any road there at all you say it was only a hog path?

A. Yes, sir.

Q. When you first knew—but you said also that horses and wagons used to go along that hog path in good weather?

A. Yes, sir.

Q. That was used before Dr. Brown dug these ditches and cut this timber for people to come across the swamp?

A. Yes, sir.

Q. And this road which Dr. Brown built up by ditching
114 and laying logs was built along the line of the old hog path?

A. Yes, sir, right in the middle.

Q. At that part of the swamp underbrush and young trees grew up very quickly?

A. Yes, sir.

Q. And if the clearing was neglected for a few years it quickly becomes covered, does it not?

Objected to because it is hypothetical and based on a supposition.

A. Yes, sir.

Q. Do you remember how wide it was along that hog path before Dr. Brown dug these ditches between the trees on either side?

A. It was not much wide.

Q. But it was wide enough for a wagon to pass?

A. Yes, sir.

Q. Was it wide enough for two wagons to pass?

A. No, sir.

Q. Could they pass one another at any points?

A. No, sir.

Q. The trees grew so thick that two wagons could not pass one another at any point between Dr. Brown's and the bluffs in Cape Girardeau County?

A. No, sir.

Q. But the line across the swamp of that hog path was a straight line?

A. Yes, sir.

Q. And it was known as the levee before Dr. Brown made these repairs?

A. Yes, sir.

Re-redirect examination:

Q. You mean to say before Dr. Brown threw up the levee and dug the ditches there was a levee there?

A. We called it a hog path, there was no levee.

Q. Didn't this hog path wind around among the big trees there?

A. Yes, sir, right above the house there was a pond, nothing but water and they had to go right through that water and mud I reckon half a mile.

115 Q. Did Mr. Brown fill that up?

A. Drained it, they called it.

Q. When you say this hog path ran straight do you mean to say that the general direction of it was straight across the swamp?

Objected to the question of counsel and to the character of his examination in that it is leading and suggestive to the witness.

A. About half way they could come right down to the house straight and those little growth was all grown up, there was a path.

Re-recross-examination:

Q. Do you remember of any bridge or culvert being made on that road across the swamp at any time?

A. Not while Master had it.

Q. Are you positive that there was no bridge?

A. There was not, only those puncheons.

Q. There was no culvert there?

A. Just those logs he hauled there much like the railroad.

Q. How old were you when you left Dr. Brown's place?

A. I don't remember.
Q. Was it before the War?
A. Yes, sir, before the war.
Q. How long before the war was it?
A. I don't remember.
Q. Might it have been as much as 10 years before the war?
A. I would not like to say.
Q. Do you know whether it was at least 5 years before the war that you went to Jackson?
A. Before the war?
Q. Yes?
A. It was just when the war first broke out.
Q. It was when the war first broke out that you left Mr. Brown's and went to Jackson?
A. Yes, sir.

Q. And at the beginning of the war there was no bridges
116 or culverts of any kind on the road across the swamp from Dr. Brown's place?

A. Only those puncheons, that was all.
Q. They were not bridges?
A. I guess not. They were laid across just like these ties.
Q. As a matter of fact, Mrs. Brown, how long did it take Dr. Brown to cut out this road across the swamp, cut out the trees?
A. I don't remember anything about that.
Q. Did he work at it steadily until he got those trees cut out or did he work at it from time to time?
A. I don't know how he worked at it after we moved up here. Mistress would let us go down once in awhile with Uncle Josh to Aunt Margaret's. She staid down there and done the cooking.
Q. Were you living up here or down there when the war commenced?
A. I was living up here. Wasn't none of them living down there. They rented the farm out.
Q. I understood you to say awhile ago in answer to one of my questions that you lived down there in the swamp until the war began?
A. Oh, no, sir, we never lived down there until the war began.
Q. Do you remember how old you were about, when you moved up here to town?
A. No, sir.
Q. Were you a child or a young woman at that time?
A. A child.
Q. Were you as old as ten years at the time?
A. I don't know, sir. I was older than Miss Althea and used to carry Miss Althea to school.
Q. Mr. Brown did this work that you have testified about after you moved up here to town?
A. Yes, sir, they fixed it some when we were there.
Q. Fixed it some before?
A. Yes, sir.

Q. When did he dig those ditches?
117 A. After we moved up here.

Q. When did he cut the trees out, was it before you moved up here or after?

A. Some of them, some of them he cut out and built a kitchen to that log house down there.

Q. You say the line was straight across the swamp along the hog path?

A. Yes, sir.

Q. That straight part was at Dr. Brown's end of the swamp?

A. Yes, sir.

Q. When did he cut out the trees on the north end which makes the line straight, was it while you were here in town or while you were living down there?

A. They cut some of them while we were down there and some since we were in town.

Q. What trees did he cut out while you were down there?

A. Those big trees.

Q. And he didn't straighten out the road at this end of the swamp by steady work, but cut out some of these trees before you left below there and cut out some from time to time after you lived up here?

A. Yes, sir.

Re-redirect:

Q. Do you remember when you moved to Scott County?

A. Oh, no.

Q. He commenced to cut this road when you lived in Scott County?

A. Yes, sir.

Signature of witness waived by counsel for defendant and plaintiff.

Defendant next offers the deposition of Jesse J. Miller, marked Exhibit 45.

JESSE J. MILLER, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

118 Direct examination by Mr. RANNEY:

Q. I'll ask you if you are the same Jessie Miller that gave your deposition a few weeks ago in this same case?

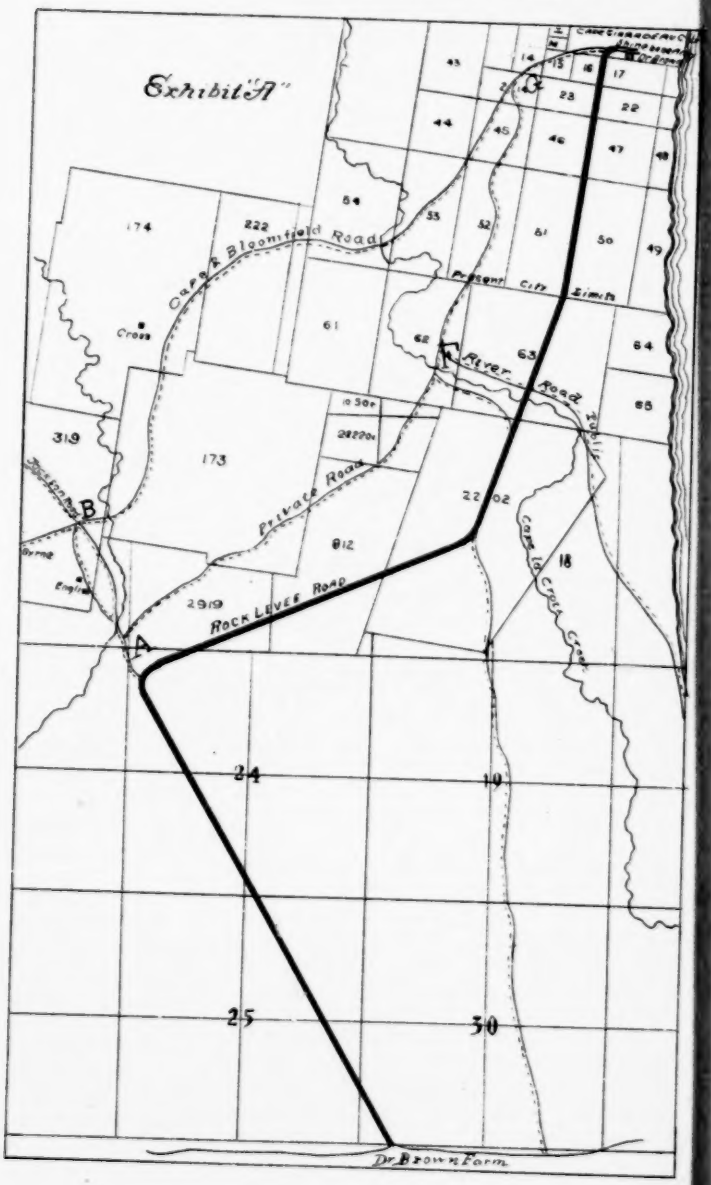
A. Yes, sir.

Q. I'll get you to examine this map, Mr. Miller, marked Exhibit "A" and state whether or not that is a correct representation of the roads, private and public, at the time you were appointed road overseer in Cape Girardeau County?

(See Exhibit "A" on Next Page.)

(Here follows diagram marked p. 119.)

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A. Yes, sir, these are about the same marks and the roads that were then.

Q. This part of the rock levee road was not built at that time?

A. No, sir, the east end of the rock levee road was not built at that time.

Q. I'll get you to state which of these roads were public roads, that were worked by the public, considered county roads and which were not?

A. The road from A to B and from B to Cape Girardeau were worked as public roads. They were the only public roads in that portion of the county that I knew anything about, was that part of the Benton road and the Bloomfield road, they were the two roads, the Benton road and the Bloomfield road, that was all the public roads we had on that side of the township or district.

Q. Here is a road leading down on the north side of Cape La Croix creek down to the river, state whether that road was a public road?

A. It was a road that the people could travel a horse back and with oxen because at that day we had no horse teams.

Q. Was that a public road?

A. No, sir, that was a private road.

Q. I thought that was a public road?

120 A. Nobody ever worked that road and a tree fell down and they just went around it. Cross and Ellis had farms down there and they generally kept it open.

Q. Was the road E to F on this plat a private or public road?

A. Private road—well, I could not say, it was a private road but everybody that wanted to traveled it, but it was a self-made road, nobody pretended to cut it out or keep it up.

Q. I'll ask you whether the road from A to G was a private road or a public road?

A. That was a road that was just traveled by the people through there.

Q. By the neighbors?

A. Neighbors and also people going from Scott County to Cape Girardeau. They just hunted out a road anywhere they could find it, that is the truth about it.

Q. Was it worked by the public?

A. No, sir.

Q. Then I'll ask you whether this road from A here to Dr. Brown's farm was worked as a public road?

A. I never saw anybody at work on that road or heard of them.

Q. Did you work it or hands work it while you were road overseer?

A. No, sir, I worked up to it and stopped. Never had any orders to work it.

Q. Where were you living, Mr. Miller, at the time you were road overseer?

A. I was living three miles west of Cape Girardeau on what is now called the Gordonville road, about half way between the Gordonville road and the Bloomfield gravel road, about one-half mile from each.

Q. Where were you living when you first knew these roads in here?

A. I was living where what we called the Peter Byrns farm.

Q. This place marked Peter Byrns' place here?

A. Yes, sir, I was born there.

121 Q. I'll get you to state whether or not you were familiar with all this country here where these roads are represented through here?

A. Yes, sir, I believe I am, when a boy while I lived at the Peter Byrns farm I used to go to Sim English's place. I would go over these grounds of a Sunday with the boys playing and besides I went with my father over that ground time and again hunting stock.

Q. I'll get you to state whether or not you know whether there was a road of any kind leading from this end, the north end of the old rock levee under the bluff around where the present rock road runs?

A. The best of my recollection there was not a sign of a road there. I have been over the ground. I never saw a road there.

Q. Then if I understand you, there was no road there at all until this rock road was built?

A. Yes, sir, there might have been, Mr. Ranney, just before this was built, there might have been some paths there, but not to my knowledge.

Q. I'll get you to state whether or not there was ever any road from the creek straight up from where the present rock road crosses the creek up to the south end of Sprigg street now until the rock road was built?

A. No, sir, there wasn't any road there.

Q. Was there a road leading from this letter F here on this private road on the north side of the creek down the river to Scott County?

A. Yes, sir, there was a road leading down the river to Scott County.

Q. What kind of a road was that, Mr. Miller?

A. Well, it was a road that people traveled. It was on the west side of a lot of farms that all fronted to the river. Was between the river and Cross' farm, Ellis' farm, Capt. Johnson's farm, the Horrell farm, was all there until it all fell into the river, the road was west of them farms and the farms all fell into the river, and then people just hacked their way through the woods any way they could get through.

122 Q. Was that road a good road compared with the other roads across the swamp?

A. Well, it was a good road in dry weather, but in winter you could not ride through there hardly a horseback, it was so muddy. There was really no road, if you go out in the swamp you would not know where you were going unless it was blazed, so people blazed it.

Cross-examination by Mr. BURROUGH:

Q. Mr. Miller, what time are you speaking of in answer to Mr. Ranney's questions?

A. I am speaking of when I was a boy from about 7 years old up.

Q. Can't you fix it by the year or years?
A. No, I don't think I could tell the year.
Q. When were you born?
A. 1834.
Q. Now from 1841 up to the time this gravel road was built you were familiar with this?
A. Yes, sir.
Q. And at that time according to your statement there was no county road as we understand the word across that swamp at all?
A. Not that I know of any shape or form.
Q. What was the name of the road leading from Jackson to Benton?
A. The Benton and Jackson road.
Q. How many divides did it have, do you know?
A. I don't.
Q. Of what district were you appointed road overseer?
A. They were not in districts when I was first road overseer.
Q. Do you remember what roads you were appointed to look after?
A. Yes, sir, the first road I was appointed on was the Gordonville road. Then they went on for a few years and then they had district roads, district roads took in sometimes 100 miles of road and one man worked the whole road.

Q. Well, did you have in your jurisdiction that part of
123 what is now the rock levee road?

A. I had the Benton, I worked the Benton part of it to the levee and sometimes from it, but never was ordered to work that as a public road.
Q. In the swamp?
A. Yes, sir.
Q. At the time you knew it please describe what is now the rock levee road through the swamp?
A. Well, sir, it had been laid with poles when I first knew it and them poles about 1-3 or 1-4 was worn out and the ground was very soft underneath of them and when a horse stepped on one of them poles the mud and water would squirt up high.
Q. How wide was the right of way cut out?
A. After I was about grown my best recollection was that I could ride right in the middle of the road and touch the bushes on both sides.
Q. How wide were the trees cut?
A. I don't know. They were not cut out very wide.
Q. Don't you know, Mr. Miller, it was cut out 60 feet wide and the brush afterwards grew up in it?
A. I don't know; about that time, well, it was later than that there was a hurricane passed through there and blew a heap of that timber down.
Q. Before the hurricane passed through could you tell from looking at the road how wide it had originally been cut out?
A. No, I could not tell.
Q. Don't you know it was from 50 to 60 feet wide?
A. No, sir, I don't know it.
Q. Wasn't it a wide straight road cut down through the swamp?

A. Yes, sir.
Q. How high was the levee itself?
A. It was right flat.
Q. All the way across?
A. Yes, sir.
Q. What time are you talking about, Mr. Miller?
A. I am talking about along in the 40's.
124 Q. You mean to say it had no dump at all?
A. It might have been a dump. It was flat.
Q. Didn't it have ditches on the side of it?
A. There had been ditches there once but they were all filled up.
Q. What did they call that road across the swamp?
A. Pole road.
Q. Did it have any other name?
A. Well, I don't recollect whether the levee was attached to it or not.
Q. Wasn't it called the levee road?
A. It might have been. I could not hardly say, most everybody talked about the pole road.
Q. Wasn't it called the road over the big swamp?
A. I believe it was called across the swamp.
Q. Wasn't it called the big swamp road?
A. Yes, sir, that was the only road there was in the swamp.
Q. Mr. Miller, that was a part of the road, direct road from Benton to Jackson, wasn't it?
A. Yes, sir.
Q. Jackson was and is the county seat of this county?
A. Yes, sir.
Q. Benton was the county seat of Scott County?
A. Yes, sir.
Q. And that was the main road from one to the other?
A. Yes, sir.
Q. Did that road in the swamp have any bridges on it?
A. I think it had a culvert.
Q. Don't you know it had a pretty good sized bridge out towards the lowest part of the swamp?
A. I don't recollect about that, Mr. Burrough. I have traveled that road ever since I was 4 or 5 years old. I used to ride behind my father and my brother too. I had a brother living on that side of the swamp and we traveled outside of the road more than in it.
Q. You used these little by-paths which lead off from the road and then come back to it, didn't you?
125 A. Yes, sir.
Q. It was, however, a straight road clear across the swamp?
A. The opening was straight.
Q. These other roads that you speak of across the swamp wound in and out and around among the trees?
A. Yes, sir.
Q. They had no bridges on them?
A. No, sir.
Q. They were not worked?
A. No, sir.
Q. Had no dump thrown up?

A. They just went through the swamp any way they could go.

Q. Do you know a place down in that country at that time named Martin's, John Martin's place?

A. No, I don't think I do. Andy Giboney had a little place out there, was the only farm I knew of between where the rock levee is now and the river.

Q. Coming down from Jackson and going to Benton was there any where along that road a pond near a ford over a creek?

A. I don't remember about the pond.

Q. Coming on further down from Jackson did you cross Randall's creek?

A. We crossed a creek called Buckner's creek.

Q. Do you remember Randal's creek any where out in that neighborhood?

A. No, sir.

Q. Didn't cross Randal creek at all going from Jackson to Benton?

A. If I did I didn't know it by that name.

Q. Did you know a place on that road on which there was a shop, I assume a blacksmith shop, near Widow Abernathy's?

A. That is what we called the Scruggs place. No, I don't believe I knew of a blacksmith shop.

Q. You remember the place?

A. Yes, sir.

126 Q. How far was that from Jackson?

A. I guess it was about 7 miles.

Q. And then coming on down that same road going towards Benton you struck what was called the Sim English place?

A. Yes, sir.

Q. Where was that with reference to the head of rock levee road now?

A. It was about between 1-2 and 3-4, that is the edge of the farm.

Q. Was it what we now call the Conran farm?

A. Yes, sir.

Q. Do you know whether or not — the year 1849 or 1850 that road from Cape to the Scott County line was divided up into five districts?

A. I guess I did.

Q. Where was the last district on that road?

A. Well, the last district that I knew of on the south side took in all the territory from above the College farm, let me see—no it took—it commenced at what we call the rocky branch on this old German church up there on the Jackson road, you know where that German church is at—Lutheran church—it took all the south end.

Q. Did any of this road district include that part of the levee road which extends from its head in Cape County to the Scott County line?

A. Never was worked by any road overseer as ever I knew.

Q. You are not prepared to say now it was not worked, are you?

A. No, sir, I never saw it and never saw anybody at work on it or ever hear anybody being warned on it.

Q. How often were you on that road?

A. You mean back and forth?

Q. Yes, sir?

A. I was there every now and then, sometimes once a week and sometimes more.

Q. Those bridges were never repaired?

A. Not that I know of.

127 Q. On the levee road?

A. I don't remember much about the bridges. I would not swear there was ever a bridge there.

Q. You will not swear there was not?

A. No, I could not do it.

Q. Was there any other way for people going from Benton to Jackson than to go over this so-called levee road?

A. Only by way of the swamp.

Q. That is you mean get off of the road and go through the swamp?

A. Yes, sir.

Q. Did you see any stumps or trees within this right of way?

A. No, I don't believe I have.

Q. Don't you know, Mr. Miller, it had the appearance of having been cut out years before you first saw it?

A. I guess it had been cut out, I could not say anything about that, but it was almost impossible in the winter to travel over it at all.

Q. How was it in summer?

A. You could go any where in the summer when it got dry.

Q. Could you go over this road we are talking about?

A. Yes, sir, if you got to know it would go much easier any where else than on the road.

Q. When did you first hear this road called the levee road?

A. I could not say that either, Mr. Burrough.

Q. Were you quite a boy?

A. I could not say. I was quite a boy, but you must recollect that according to customs now a person living in one part of a community and somebody else living in the other, one lot of people would call one name, they might call it one name and another party might call it something else, but the people called it mostly the pole road. I might have heard somebody say the levee, but they called it the pole road.

Q. How old was that levee, do you know?

A. No, sir, I do not.

128 Q. Was it there when you were a boy?

A. Yes, sir, that opening was there when I was a boy and poles on it and the biggest portion of them wore out.

Q. The road dump had been thrown up, hadn't it?

A. I guess it had but the ground was so soft that it just flowed back, it was level when I first knew it.

Q. You first knew it in about 1841?

A. Yes, sir, I have known it ever since I was a small boy. I have been over to Dr. Brown's with my father I suppose when I was only 3 or 4 years old.

Redirect examination:

Q. Mr. Miller, I'll ask you whether or not you ever worked a road running down Cape La Croix on the east side next to the river as road overseer?

A. Yes, sir, I worked that, started to cut a new road there and did cut out a portion of it and it was ordered to be worked and I was road overseer at that time and did work it down as far as it was cut out.

Q. To the Scott County line?

A. No, sir, it didn't go half a mile from where the present bridge is on the creek now, the gravel road.

Q. Well, were not these other roads that lead across the swamp, were they not called roads across the swamp also, the one down the river and the one through the college farm?

A. Yes, sir, that down the river was at one time for the people on the east side of Scott County, they all traveled that road.

Q. It was known as the road across the swamp?

A. Yes, sir.

Q. Well, wasn't there another road that run in by the College farm that was known as the road across the swamp also?

A. Yes, sir, there was a way to cross there, you could go through and come out near the rock levee if the slough was not too high. There was a slough in there and sometimes the water was too high to cross it.

Q. I'll ask you, Mr. Miller, whether there ever was within
129 your recollection a mill close to the north end of the old rock levee?

A. I know about one mill. There was a saw mill there. Well, Sim English had a mill when I was a little boy but he had it in his barn.

Q. I mean down there by the bluff?

A. No, sir, I never knew of any mill there.

Q. Was there any mill in that neighborhood belonging to a man by the name of Davis or Dives?

A. There was a mill on Cape La Croix that was owned by two men, but I forgot their names, that was a water mill.

Q. Was that close to the Bloomfield road?

A. Where the Bloomfield road is now it is. It was about 1-2 a mile, may be 3-4 from the old Bloomfield road. It was right between where the present Bloomfield road is and the old Bloomfield road. I don't think the man's name was Davis though, either one of them.

Q. That was the only mill that you knew anything about?

A. Yes, sir.

By Mr. Giboney Houck:

Q. Mr. Miller, was this road that you say leading from the north end of what is now the rock levee called the Benton road within later times, say since 1852?

A. The part from the rock levee to where?

Q. Jackson?

A. Yes, sir, it was. That was called the one way or the other.

It was either the Benton and Jackson road or the Jackson and Benton road.

Q. You are prepared to say that was called the Jackson and Benton road according to your best recollection before 1850?

Plaintiff objected to counsel cross-examining his own witness.

A. Yes, sir, I think so.

Recross-examination.

Q. At the other end of it, from the north end of the levee on towards Benton was also called by the same name?

A. Well, natural consequences would make that. You would have to call it a portion of the Benton road, where the people
130 traveled, but whether they traveled it or outside of it that would be immaterial. It would have to have a name. If you are going to direct a man and direct him to the end of that pole road and stop right there he would not know whether he was going to Benton or not.

Signature of witness waived by counsel for plaintiff and defendant.

Mr. SMITH: We desire to offer Section 6 of the Session Acts of 1851 approved February 27th, 1851, at page 260.

Mr. DEMPSEY: We object to that on the ground that it is a general statute of which the Court will take judicial notice and that the records should not be encumbered.

By the COURT: I will not permit the record to be encumbered.

This was all the evidence.

Thereupon the court took the cause under advisement, and the same held under advisement until Monday, May 9th, 1904, at which time the court rendered a written opinion.

That on the same day and at the same time the court made findings and rendered a judgment in favor of respondent in words and figures following; a certified copy of which with order granting an appeal of the cause is on file with the Clerk of this Court for all the purposes of this appeal.

To the findings and judgment of the court respondent objected and excepted at the time.

Thereafter at the same term and within four (4) days after the rendition of said judgment, to-wit, May 10, 1904, the respondent filed its motion for a new trial in words and figures following:

Now comes the respondent in the above entitled cause and moves the court to set aside the findings and judgment herein and grant a new trial for the following reasons, to-wit:

No. 1. Because said findings and judgment are against the evidence, adduced on the trial herein, and against the weight of said evidence.

131 No. 2. Because said findings and judgment are against the law and against both law and the evidence.

No. 3, Because the court erred in admitting illegal and incompetent evidence offered by the relator on the trial herein against the objection of the respondent.

No. 4, Because the court erred in excluding legal and competent testimony offered by the respondent on the trial herein.

No. 5, Because the findings of the court should have been in favor of the respondent.

No. 6, Because under the pleadings and evidence herein the judgment should be in favor of Respendent instead of Relator.

No. 7. Because the court erred in holding the words "perpetual succession" as found in the respondent's charter only operated to keep alive its franchises and privileges for fifty years and on the expiration of its franchises and privileges its property went to the public without compensation when the court should have held that even though respondent's franchises had expired its property could go to the public only by its consent or upon just compensation being made to it by the public.

No. 8, Because the court erred in holding that respondent's grantor the Cape Girardeau and Scott County Macadamized Road Company did not hold its right-of-way in fee for purposes of alienation and because the evidence that all the property through which that road ran was owned by its stockholders, at the time of its construction and ever afterwards was disregarded.

No. 9, Because the court erred in holding the respondent did not own the strip of land over which its road was built in fee.

No. 10, Because the court erred in holding it was not material whether the turnpike road in controversy was constructed along and over a public highway or not and that the act of the company constructing, maintaining and operating the road and receiving the tolls for fifty years operated as a dedication of the highway to the public.

No. 11, Because the court erred in holding the right-of-way
132 of the respondent was not property within sections 4, 21, 30 and 32, Article 2 of the Constitution of the State of Missouri, and section 10, Article 1, and the 5th and 14th amendments of the Federal Constitution.

No. 12, Because the court erred in holding that even though the respondent had never been compensated for its road, and right-of-way, the taking of it by the state without compensation would not be a violation of sections 4, 15, 21, 30 and 32, article 2, of the Constitution of the State of Missouri, and section 9, paragraph 3, and section 10, paragraph 1, article 1 and section 4, article 4, and the 5th and 14th amendments of the Constitution of the United States.

No. 13, Because the court erred in holding that the act under which this suit was brought constituted due process of law within the meaning of section 30, article 2 of the Constitution of the State of Missouri.

No. 14, Because the court erred in holding that the act under which this suit was brought was not unconstitutional within the meaning of section 30, article 2 of the Constitution of Missouri, and the 14th amendment of the Federal Constitution which provides that no state shall deprive any person of life, liberty or property without due process of law.

RANNEY, SMITH & HOUCK,
Att'ys for Respondent.

That after the argument of counsel on said motion, and the court being fully advised of and concerning the same, made the following order, overruling said motion for a new trial, in words and figures following:

Now comes respondent and files motion for new trial herein, which said motion is taken up, seen, heard and by the Court overruled, to which respondent objects and excepts.

To the action of the court in making such order, overruling said motion for a new trial, the respondent objected and excepted at the time.

Thereupon respondent filed its application and affidavit for an appeal to the Supreme Court of Missouri, and the court then and there granted said appeal as prayed for, and ordered further
133 that respondent be given ninety days from the 10th day of May, 1904, within which to file its bill of exceptions herein.

And also made its order giving respondent ..... days within which to file its appeal bond.

And afterwards, and within the ninety days fixed by the court, to-wit on the 1st day of August, 1904, Respondent did tender its said Bill of Exceptions in said cause, which was then and there signed and sealed by the court, and filed by the clerk of said court on said 1st day of August, 1904.

M. R. SMITH,
GIBONEY HOUCK,
R. G. RANNEY,
Attorneys for Appellant.

And afterwards to-wit, on the 9th day of February, 1907, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Resp.,
v.
SCOTT CO. MACADAM. RD. CO., App.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court.

And afterwards to-wit, on the 11th day of June, 1907, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Appeal from St. Francois County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Francois County Circuit Court rendered, be in all things affirmed and stand

in full force and effect; and that the said respondent recover against the said appellant his costs and charges herein expended, and
134 have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

135 In the Supreme Court of Missouri, Division No. 2, April Term, 1907.

#12667.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

This is a proceeding *ex officio* by the Prosecuting Attorney of Cape Girardeau county to perpetually enjoin the defendant, its officers, agents, servants, successors and assigns from maintaining a public, continuing nuisance by obstructing a public highway in said county, known as the Scott County Road and sometimes as the Rock levee across the Big Swamp from the City of Cape Girardeau to the bluffs in Scott county, by maintaining on and across said highway, toll gates and exacting toll from the public who have occasion to use said highway. The petition alleges that said road is a public highway and has been such for more than thirty years; that the defendant is a corporation organized under the laws of this state, and without authority it maintains on and across said highway at various points, bars and obstructions commonly called toll gates, and that it prevents the public from making free and proper use of such highway and that such toll gates are a continuous public nuisance. By consent of parties, a change of venue was granted to St. Francois county. The defendant then filed an amended answer to plaintiff's petition. This amended answer consists of a general denial and an affirmative defence that no portion of said road was ever a free public highway, and that the public never had any interest in said highway; that said toll gates and tolls collected are authorized by law; that the defendant is a corporation duly organized and as such is authorized to own a turnpike road as above described, and that the portion of this road that passes across the Big Swamp was constructed in the years 1853 and 1855 by its grantor, "The Cape Girardeau and Scott County Macadamized Road Company"
136 That in the years 1872 and 1873, the said last named company procured its right of way along the north side of said swamp by condemnation, donation and purchase and finished the construction of its road to the City of Cape Girardeau, that said road so constructed to the City of Cape Girardeau was maintained and kept in repair from the time of its construction up to the present time by defendant and its grantor; that the same has been used as a public thoroughfare, travelers thereon paying the tolls at all these times fixed and exacted; that the expenditures for maintaining said road have about equalled the receipts from tolls; that dividends to stock-holders have been very small, not enough to reimburse them

for the outlay for the construction of said road; that the said Cape Girardeau and Scott County Macadamized Road Company was created by act of the Legislature, approved February 24, 1853, that by the provisions of said Act, said Macadamized Road Company was granted the exclusive privilege of constructing a macadamized road across the Big Swamp in the county of Cape Girardeau, with the privilege of extending the same to the City of Cape Girardeau, and that said company should have perpetual succession as such and that at any time after the expiration of twenty years, the counties of Cape Girardeau and Scott should have the right to purchase said road for the purpose of making the same a free road, but that in the event that said sale should be made, the said counties of Cape Girardeau and Scott should pay to said company the actual cost of the construction of the same. That relying upon said Act, believing that the terms and provisions thereof would be upheld and carried out by the State, said Company went to work as soon as could be done after the passage of this Act, to construct and build, and during the years 1853, 1854 and 1855, did build and construct said road and complete the same across the Big Swamp, in accordance with the requirements of said act, and afterwards in the year 1873, did extend the said road to the City of Cape Girardeau; that said road was built by said company at great expense for labor and
137 material to-wit, thirty thousand dollars; that said company was at all times willing to sell said road to said counties in accordance with requirements of said act, but said counties wholly failed and refused to buy said road. And defendant further alleges that it acquired from the said Cape Girardeau and Scott County Macadamized Road Company, by issuing to the stockholders of the said company fifteen thousand dollars of the paid up capital stock of this defendant for said road.

Defendant further answering says that the proceedings of plaintiff under this petition violate Sections 4, 15, 21, 30 and 32 of Article 2 of the Constitution of the State of Missouri, and section 9, paragraph 3, and section 10, Article 1, section 4, Article 4, and the 5th and 14th amendment- of the Constitution of the United States, which provides that the private property, to-wit, the property of this defendant, cannot be taken without due compensation and process of law, and defendant pleads said several sections and provisions of the Constitution of the United States and the State of Missouri in bar to the pretended cause of action set up in the petition and proceedings of the plaintiff in this behalf instituted. The defendant for further answer says that it purchased the said road for the sum of fifteen thousand dollars in its full paid up capital stock, which was delivered to the last board of directors and trustees of the Cape Girardeau and Scott county Macadamized Road Company, and defendant avers that under the laws of the State of Missouri, after the expiration of the charter of the Cape Girardeau and Scott county Macadamized Road Company the last board of directors and trustees of said company had good right to sell and convey the private property and assets belonging to said Cape Girardeau and Scott County Macadamized Road Company to a new company organized for the purpose of owning said road; and that it was the well settled policy, established by the laws of this state to authorize a conveyance of the

property belonging to said corporation whose charter had
138 expired to convey its property to a new corporation organized in that behalf. And defendant denies that the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company have ever been reimbursed in full or for any part of the capital invested by it in the construction of the said road, and that under the laws of this state said company was authorized to transfer all the property it owned at the time of the expiration of its charter to another corporation organized to take over and operate the said road, and this defendant avers that for valuable consideration it has acquired the said road and all the assets, land and property of the said company and is now the lawful owner thereof and in lawful possession thereof and has acquired a fee and title in fee simple to the said road and right of way sixty feet wide from the owners of the fee adjacent and bordering upon the said road and that plaintiff has no interest or right to the said road in law or equity. And having fully answered prays that the temporary injunction be dissolved and the defendant be discharged with its costs. To this answer a reply was filed denying all the new matter set up in the answer and especially pleaded that by the Act of February 24th, 1853, the Cape Girardeau and Scott County Macadamized Road Company had authority to build a macadamized road from Cape Girardeau to Scott county and keep the levee aforesaid for a period of fifty years; that said right expired on the 24th of February, 1903, whereupon the said road so constructed by said company was and became a free public highway disburdened of the right of said Macadamized Road Company to take tolls thereon; that said macadamized road company had no power of authority to acquire any fee simple title whatever, and its only right was to acquire an easement or rights of way for the purpose of said road, and that it did not acquire any fee simple title to the road bed and had no authority to sell to this defendant or any one else its right to take tolls or its road bed; that the stockholders of the said macad-
amized road company after the expiration of its charter in
139 order to deprive the public of its free public highway, organized a new corporation known as the "Scott County Macadamized Road Company," and caused a pretended conveyance to be made by the last board of directors of the old company of the roadway, property and franchises of the said Cape Girardeau and Scott County Macadamized Road Company to this defendant. That the defendant Company had no assets; that no money was paid for its capital stock and the whole transaction was a scheme contrived to attempt to perpetuate the wrongful and unlawful claim to take tolls forever over the road aforesaid. And relator avers that the entire road now claimed by the defendant from Cape Girardeau to the north end of the levee across the levee in Scott county was by its construction and opening to the public, dedicated by the company constructing it, to the public, and thereby became and was and has ever since been a public highway used by the public at all times subject only to the right of the former company to maintain toll gates up to February 1903. And that at the expiration of the charter of the said Cape Girardeau and Scott County Macadamized Road Company, all the roadway, rights and franchises of said company vested

in the public and said road became a free public highway by operation of law, and the defendant is unlawfully obstructing said highway by its toll gates to the great injury of the public, and again prays judgment for a perpetual injunction.

Upon the trial the following facts were developed. By the Act of the Legislature approved February 24th, 1853, (Laws of Missouri 1853, page 337) "The Cape Girardeau and Scott County Macadamized Road Company" with the capital stock of fifteen thousand dollars was created a body politic. The company was given "The exclusive privilege of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, where said swamp commenced below the City of Cape Girardeau and ran across said swamp a distance of three or four miles, with the privilege of extending the same to the City of Cape Girardeau."

140 In the years 1853, 1854 and 1855 the road across the swamp was constructed, toll gates erected and it has been operated as a toll road ever since. In the early seventies the road was extended as contemplated by the act to the City of Cape Girardeau, and this extension also has been operated as a toll road up to the present time. The right of way for a part of the last constructed road was obtained by condemnation proceedings. It does not appear that the Cape Girardeau and Scott County Macadamized Road Company ever obtained any portion of the right of way by any kind of deed of conveyance, except in one instance. By the 8th section of the act of provides that "The privileges granted in this charter shall continue for fifty years, provided that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road." And by the first section of the Act it was provided that said Macadamized Road Company "May and shall have perpetual succession as such, and may make and use a common seal, and the same to alter at pleasure." From the time this turnpike road was first constructed it has been used continuously by the public as a thoroughfare and highway, subject only to the right of the said company to take and collect tolls fixed by the 7th section of the said Act. On May 26th, 1903, the defendant, the Scott County Macadamized Road Company filed articles of incorporation with the Secretary of State to exist for a period of fifty years. The article alleges: "That the undersigned have formed themselves into a corporation for the purpose of constructing and owning a macadamized and gravel road under article 5, chapter 12 R. S. 1899." The road described in the article is the same as had recently been operated by the Cape Girardeau and Scott County Macadamized Road Company. On May 27th, 1903, a contract was entered into signed by Louis Houck, President of the Cape Girardeau and Scott County Macadamized Road Company, and Giboney Houck, president of the Scott County Macadamized Road Co. the purpose being to consolidate the two companies under section 1221 R. S. of

141 Missouri, 1899. Since May 27th, 1903, the defendant has been operating said toll road and is now engaged in operating same and taking toll from travelers thereon. On May 27th, 1903, Louis Houck, and others, directors and managers of the Cape Girardeau and Scott County Macadamized Road Company prior to

the 24th day of February, 1903, in consideration of one dollar and the issuance to the various stockholders of the Cape Girardeau and Scott County Macadamized Road Company of shares of its capital stock equal to the number of shares held by each of the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company, conveyed to defendant, the real estate, property, assets, rights and franchise of the Cape Girardeau and Scott County Macadamized Road Company, including its road bed and right of way, toll gates etc. A quit claim deed from K. H. and W. L. Killibrew was made to the Cape Girardeau and Scott County Macadamized Road Company, dated June 17th, 1892, "to hold for the purpose of operating and owning thereon a macadamized and gravel road forever, either by itself or its successors or assigns, provided however if at any time said gravel road company or its successors or assigns should abandon said gravel road and business of operating and running the gravel road over the said strip of ground, that then the said strip of ground shall revert to the parties of the first part or their assigns." There were also other quit claim deeds to the defendant covering various other portions of the right of way of said road. There was also much documentary evidence and testimony of witnesses offered on the question as to whether a public highway had existed along the route of the road in question prior to the year 1851. No records were offered showing the establishment of a county road by order of the county court, but the evidence did tend to show that the portion of the road crossing the Big Swamp or what was known as the rock levee was traveled by the public prior to the construction of this toll road. The circuit court after a full hearing rendered a decree for the plaintiff perpetually enjoining the defendant, its officers, agents, servants, successors and assigns from further
142 maintaining toll gates on and across said road and from in any way interfering with the public in the free use of said highway.

1. At the threshold of the consideration of this appeal, we are met with the suggestion of the plaintiff that this court is without jurisdiction to determine it for the reason that no constitutional question is involved in its determination. It will be observed that the defendant in its answer assails this proceeding on the ground that if permitted it would be a denial of due process of law and an impairing of the obligation of its contract with the state and a taking of its property without just compensation and pleads the sections of the Constitution which guarantees that immunity. Counsel for plaintiff in urging that this court is without jurisdiction insists that that question cannot arise for the reason that the state is not seeking to recover the toll houses gates and other personal property of the defendant, but is asking only that its citizens be permitted to travel over the surface of this highway without payment of unlawful toll. It is true that this is the purpose of the action, but it is also true that defendant asserts a fee simple title in the road and at least a right to an easement over it, and that this proceeding would impair the obligation of the contract with the state and of its grantor, which if sustained by this court would necessarily defeat the injunction, and while it may be that upon a full investigation of these questions, the result will be reached that no constitutional right of the defendant

has been or will be infringed or impaired by this proceeding or
judgment of the Circuit Court. We are of the opinion that a c
stitutional right is sufficiently asserted under all the circumstan
to put the jurisdiction in this court instead of the court of appe
If transferred to the court of appeals, these same questions wo
be presented there, and that court must necessarily decide fi
whether a constitutional question was raised, and seco
whether there was merit in it. While we have ruled t
we will look sufficiently deep into the record
143 ascertain whether jurisdiction properly belongs to t
court and will not entertain it merely because some sect
of the constitution is named, still where the question is mooted a
we can see that the constitutional question must be passed up
even though adversely, we think it is our duty to hold jurisdict
of the case, and accordingly we shall dispose of the appeal on
merits in this court.

2. In State *ex rel. vs.* The Hannibal and Ralls county Gra
Company, 138 Mo. 332, without discussion a proceeding by inju
tion to restrain a corporation whose charter had expired from cha
ing and taking tolls upon a public highway, was sustained. Af
wards in State *ex rel. vs.* Gravel Road Company, 187 Mo. 439,
propriety of that ruling was questioned, but as it was ruled in t
case, that this court had no jurisdiction of the appeal and as a r
jority of the court did not concur in the views of Judge Marshall t
quo warranto was the only remedy for such a wrong, and that
it was a legal remedy, injunction would not lie, it cannot be c
sidered that the decision in State *ex rel. vs.* Gravel Road Co., 138 M
332, has been authoritatively disapproved by this court, or eit
division thereof. After the case of State *ex rel.* Jump *vs.* The Gra
Road Company *et al.*, was transferred by this court to the Court
Appeals, that court in the 116 M. A. 175, held that injunction w
a proper remedy to prevent a continuing public nuisance and it w
proper for the prosecuting attorney of the county to institute su
a proceeding *ex officio*. The court of appeals while conceding t
the state might have proceeded by *quo warranto* against the corpo
tion to oust it of its charter and franchise, proceeded to take up t
question on principle whether injunction could also be resorted
and reached the conclusion that the great weight of authority in t
country, as well as in England, was to the effect that in addition
the remedy at law by *quo warranto*, it is now settled that a court
equity may take jurisdiction in cases of public nuisances upon
formation filed by the Attorney General or other proper
144 ficer authorized to represent the State. Thus in City
Georgetown *vs.* Alexandria Canal Company 12th Peters
the Supreme Court of the United States sustained the jurisdicti
of the court of equity, on the ground that equity can give more a
quate and complete relief than can be obtained at law. In Attorn
General *v.* Jamaica Pond etc., Co. 133 Mass. 363, it was sa
"Cases are numerous in which it has been held that the attorn
general may maintain an information in equity to restrain a corpo
tion, exercising the right of eminent domain, from any abuse or p
version of its powers which might create a public nuisance or inju
ously affect or endanger public interests." Agar *vs.* The Regen

Canal Co., Coop. Temp. Eldon, 77; Attorney General *vs.* Great Northern R. R. Co., 1 Dr. & Sm. 154; Attorney General *vs.* Mid-Kent R. R. Co., L. R. 3 Ch. 100; Attorney General *vs.* Great Eastern R. R. Co. 11 Ch. d. 449; Attorney General *vs.* Great Northern R. R. Co., 4 De G. & Sm. 75; Attorney General *vs.* Cohoes Co., 6 Paige 133; People *ex rel. vs.* Newburg Plank Road Co., 86 N. Y. 1. As said by the court of appeals, "If the collection of the tolls was nuisance, maintained in the public highway, then it was the right of the public to have such nuisance abated or restrained forthwith and it was the duty of the State in its sovereign capacity to institute such proceeding in that behalf as would render to its citizens immediate reinstatement of a free and unincumbered highway. A proceeding by *quo warranto* would have been of a tedious nature where the relief sought could only be adjusted upon a final determination of the cause, whereas a proceeding by injunction would afford immediate and adequate relief inasmuch as the restraining order of the court could be had forthwith, and the otherwise constant and recurring nuisance be thereby abated during the pendency of the suit, the ultimate result being the same in either proceeding. And indeed, the daily practice of unlawfully exacting tolls from those persons using the road was a standing and continuing infringement of their rights, which could be immediately relieved only by the extraordi-
145 nary process of injunction, and upon each successive exaction of toll, a right of action arose in favor of the person who was required, to pay the same against those persons so unlawfully exacting it, which could be adjusted between the parties only by a multiplicity of suits at law." We have no doubt whatever, that this proceeding by the prosecuting attorney *ex officio* to abate this public and continuing nuisance was and is the proper remedy. Since the decision of this court in State *ex rel. vs.* The Gravel Road Co., 138 Mo. 332, the Legislature of this State, at the regular session in 1901, enacted a new section to chapter 151 of article 5 of the R. S. 1899, known as section 9547, which provides: "The control and management of all graveled or macadamized roads of this State, which may have been originally constructed by any corporation, whether organized under special act of the Legislature or under general law, whose charter life has expired or may hereafter expire shall immediately pass to and vest in the county court in which such road may be situated, and in all cases where such corporation, whose charter life has expired by limitation or otherwise, is in the possession of and in control of such roads, and is collecting tolls thereon, it shall be the duty of the prosecuting and circuit attorneys of the respective counties or circuits through which such road or roads may run to prosecute suits in the name of the state at the relation of such attorneys to enjoin, restrain and prohibit such corporations from collecting such tolls, and such suits may be prosecuted in the name or names of one or more citizens of such counties or circuits who reside in the vicinity of such roads and travel over the same, and in case the prosecuting or circuit attorneys fail or refuse upon request to prosecute the same, any citizen may in the name of the State at the relation of said citizen prosecute such suits to the same extent and in the same manner as the circuit or prosecuting attorney could have done." Laws of Missouri 1901 page 235. It would seem that neither our

learned brother who wrote the opinion in State *ex rel. vs.* Gravel Road Co., 187 Mo. 439, nor the court of appeals when pre-
146 paring its opinion in the same case in the 116 M. A. 175 had his or its attention called to this new act, which evidently was intended to embody in the statute law of this state the principles approved in State *ex rel. vs.* Gravel Road Company 138 Mo. 332, and State *ex rel. vs.* Gravel Road Company, 37 M. A. 504.

3. The defendant insists that the Act of February 24, 1853, incorporating the Cape Girardeau and Scott County Macadamized Road Company, Laws of Missouri 1853 chapter 337, conferred upon it continuous and uninterrupted succession and that the charter of the said company did not expire on February 24, 1903, by limitation, or in other words, at the end of the fifty years prescribed by the 8th section of said Act, for its existence. The learned counsel concedes that this court in State *ex rel. vs.* Payne, 129 Mo. 468 settled the law adversely to its contention, and that, that case was followed and approved in State *ex rel. vs.* The Gravel Road Company, 138 Mo. 332, in which cases it was held that the words "perpetual succession" implied nothing more than a continuous succession during the existence of the corporation as is fixed by its charter. But we are asked by the learned counsel to review those decisions and to hold that notwithstanding the limitation in the act for the exercise of the privileges conferred, that the words "perpetual succession" created a perpetual charter in the Cape Girardeau and Scott County Macadamized Road Company. We have read with interest the argument of the learned counsel, and the authorities to which they refer, but have not been convinced that our previous rulings in the cases just cited were incorrect; on the contrary, we are more than ever satisfied with the absolute soundness of the conclusions reached in those decisions upon this point and that they correctly overruled Fairchild *vs.* The Masonic Hall Association 71 Mo. 526, Chancellor Kent in 2nd Kent's Com. 267, long ago announced the true meaning of the words perpetual succession in corporate charters. Wherein he says: "It is sometimes said that a corporation is an immortal as well as an invisible and intangible
147 being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal that it is well known that most of the private corporations recently created by statute are limited in duration to a few years." In the 7th American and English Ency. of Law (2nd Ed.) page 684, it is well said, "When it is said that one of the distinguishing features of a corporation is the capacity of perpetual succession, this must be understood to mean a potential not an actual perpetuity; a capacity, as contradistinguished from partnerships and other voluntary associations, to continue in existence indefinitely, up to the period of its constitutional or statutory limitation, in spite of the withdrawal or death of any of its members." And in 10 Ency. of Law and Procedure, page 148, it is laid down that these words, "perpetual succession" mean in a general sense that the corporation is endowed with the faculty of existing forever unless the same or another

statute or the constitution has fixed and limited *to* the term of its existence. In other words, the terms "perpetual succession" is understood to mean indefiniteness of duration, and do not refer to length of time but rather convey the idea of regularity or unbroken continuity of existence." See also Field on Corporations section 57, Ang. and Ames on Corporations section 8. So that it must be held that by the limitation in the 8th section of the act incorporating the Cape Girardeau and Scott County Macadamized Road Company, the charter of that road expired on the 24th of February, 1903.

4. But it is insisted that notwithstanding the charter of the Cape Girardeau and Scott County Macadamized Road Company expired on the 24th of February, 1903, that fact did not and could not impair or destroy the title of the said corporation in the said macadamized road and it must be regarded as property within the meaning of both the state and the federal constitutions and that the last board of directors of said corporation as trustee for the said corporation had the capacity and power to convey the same to the defendant herein or to consolidate with the defendant herein and thereby transfer the title for the road to the present defendant company, which is incorporated to build and own a toll road, and that this proceeding seeks to deprive the defendant of its property in said road, which it acquired from said defunct corporation, without due process of law and without compensation.

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To rid this question of all confusion, it may be well to remark that by this proceeding, the state does not claim or seek to recover by this action, the toll houses, gates or other personal property of the appellant, but seeks only to restrain and prohibit the defendant from longer obstructing this road, which the state insists became on the 24th of February, 1903, a free public highway disburdened of the public and continuing nuisance of toll gates across the same and the exaction of illegal tolls by the defendant, its agents, servants and employees. And thus we are brought to the real contention in this case, to-wit, what was the character of the rights acquired by the Cape Girardeau and Scott County Macadamized Road Company under its charter of 1853. By reference to the Act itself, it will be seen that this corporation was created for a public purpose, to-wit, that of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, with the privilege of extending the same to the City of Cape Girardeau, with the privilege of taking tolls from all persons who should travel thereon and to enforce the collection of the same by erecting gates or turn pikes to obstruct the passage over said road until the tolls fixed by the act were paid. And the right to exercise this privilege was expressly limited to fifty years. No power was granted to said corporation to obtain a fee simple title to the land over which said road should be constructed. The only right granted to it was to obtain an easement or right of way for its said proposed road. The nature and character of turnpike roads was fully examined in State *ex rel. vs.* Gravel Road Company, 138 Mo. 332. It was there said "Now a turnpike is a highway differing neither in the responsibility for its proper maintenance nor in any other particular from

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an ordinary highway, save in the mode of constructing and maintaining it. An ordinary public road is maintained and repaired by taxes, a turnpike is supported and maintained by the tolls exacted. A turnpike is regarded in law as a public easement and not as private property. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway. These principles are well established. Com. *vs.* Wilkerson, 16 Pick. 175; Craig *vs.* People, 47 Ill. 487. The public character of the easement is made more manifest when the charter of such companies permits the condemnation of real estate in acquiring their right of way as was granted by the act of 1851, section 8, page 261. Knox Co. *vs.* Kennedy, 92 Tenn. 1. And as if to emphasize this view it has often been ruled that when the charter permitted the use of an established highway for a turnpike it imposed no additional burden upon the adjoining landowners by changing the highway into a toll road, on the principle that the character of the easement was not changed, the road remaining a public highway. Carter *vs.* Clark, 29 Ind. 238; Chagrin Falls & Cleveland Plank Road *vs.* Cane, 2 Ohio, St. 419; Panton Pike Co. *vs.* Bishop, 11 Vt. 198; Callison *vs.* Hedrick, 15 Grat. 244; Douglas *vs.* Boonsborough Turnpike Road Co., 22 Md. 219; Wright *vs.* Carter, 27 N. J. L. 76; Walker *vs.* Caywood, 31 N. Y. 51." And in that same case, the question now presented arose and was determined, and it was said "Having reached this point (to-wit, the date on which the charter rights of the company expired) we are confronted with the question what becomes of the turnpike or plank road after the franchise expires? We think that the weight of authority and sound reason concur in holding that upon the termination of the franchises the road remains as before a public highway, wholly free from the burden of tolls. Particularly is this true when, as under our statute, the turnpike company merely acquires an easement in the road during its charter life, and not a fee in the land on which the road is laid out. The easement in a turnpike as well as in an ordinary road is vested in the public and when the turnpike company's charter expires, its easement ceases, but the easement of the public continues until revoked by law. State *vs.* Maine, 27 Conn. 641.

In Pittsburgh, etc., R. R. *v.* Com. 104 Pa. St. 583, the Supreme Court of Pennsylvania states the law in these words: 'The question is, did the forfeiture of the charter of the turnpike company wholly destroy the character of the road as a public highway? The right of the company to take tolls was ended. Its liability to keep the road in repair was terminated, yet the road as a public highway remained. No judgment or decree had destroyed its character as such. It had been dedicated to public use. The forfeiture of the charter of the turnpike company destroyed the rights of that corporation, yet the road still remained, in fact and in law, a public highway.' Craig *vs.* The People 47 Ill. 495. And in McMullin *vs.* Leitch, 83 Cal. 239, it was held that the road becomes a public highway by dedication at the time of its construction subject to the rights of the company to collect the tolls for the period prescribed by statute

and at the termination of such period neither the company or stockholders have any interest in the road for which they are entitled for compensation. 27 Am. & Eng. Ency. of Law 324, *et seq.*" In addition to the authorities above quoted the learned circuit Judge who tried this cause has added others, among which is People *ex rel.* Vivian *vs.* Virginia Canon Toll Road Co., 45 Pac. Rep. 398; 22 Colo. 429; In that case a company was formed in 1865 for the purpose of establishing a toll road. The company's existence was for a term of twenty years. In 1881 the respondent company was formed for the purpose of acquiring and did acquire as far as they could be alienated, all the rights, property and franchises of said first company. This action was brought in 1896, to exclude the respondent from its assumed franchise to collect tolls, and that the corporation be dissolved. A demurrer to the petition was overruled, which action of the lower court was sustained by the Supreme Court. The court through Campbell, J., among other things, says: "A
151 toll road is a public highway, differing from ordinary public highways chiefly in this, that the cost of its construction in the first instance is borne by individuals or by a corporation, having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof, constitute a dedication of the same as a public highway. The right of a corporation or of an individual to exact toll is not of common right, and, in this country, does not exist in the absence of a grant from the Legislature. The power of collecting tolls is a part of the sovereign power of the state, which the Legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with any restrictions which the Legislature may see fit to impose, and the grantee takes subject to all such limitations; and the grant of the right is the equivalent of, or compensation for, the cost of building and maintaining the road. * * * But if we assume that the wagon road company might alien its franchise to collect tolls, and that the defendant toll road company now has, by purchase, all the tangible property of the former company, and also the franchise to exact tolls which its grantor possessed, it must logically follow that as the result of such acquisition the grantee company has only the same powers which its grantor had, and no different or enlarged powers. In other words, whatever limitations or burdens existed against the grantor still exists as against the grantee. The inquiry then is, what is the extent of the powers of the wagon road company? Under the territorial act of incorporation the wagon road company's existence as a corporation expired in 1885. It was then legally dissolved as a corporation, and was thereafter incapable of exercising its franchise to collect toll. Neither could it, by a conveyance made during its incorporate life, impart to any other corporation, or to a natural person, the power to continue the exercise of its corporate franchise after that franchise itself expired by limitation of law. The limitation in the general
152 incorporation act of the territory of twenty years as the term of existence of the company operates in the same way as

though by expressed words the exercise of the power to collect tolls was limited to twenty years. Elliot, Roads & S. 83; Am. & Eng. Ency. Law 324 *et seq.* But plaintiff in error insists that its property is valuable only in case it has the right to collect tolls, and therefore, that such use of its property is of itself a property right, and unless there is some way whereby it can enjoy this use of its property after its corporate life has ended, practically it is deprived of its property without due process of law. The argument proceeds upon a false premise. In the eye of the law, the toll road was dedicated by its owner as a public highway. While in one case (People *vs.* Newburgh & S. Plank road Company, 87 N. Y. 1) it was held that if a private corporation owns the fee on which the way exists, the public does not acquire the right to use the way upon the expiration of the charter, which decision has been said to be contrary to the weight of authority (Elliot Roads & S. 54,) yet where the corporation has only an easement, as is the case here, and not the fee, the authorities are unanimous that upon the expiration of the charter the way becomes a public highway. 27 Am. & Eng. Enc. Law, *supra* and cases cited. The easement in, or the right to pass over, the roadway which the corporation laid out, belongs to the public, subject to the necessity of paying tolls only for such length of time as the corporation exists. The contract between the state and the corporation contained in the charter, or resulting from the act of incorporation under the general laws, is that the corporation shall possess during its corporate life the power of collecting tolls, which is regarded as a compensation and a full equivalent for the cost of construction and operating the road. The corporation accepts the grant subject to this condition, and supposing at least, that the business will prove remunerative. This right to collect tolls, not belonging to the corporation either as a matter of common right or
153 for an indefinite time, as a grant from the Legislature, but for such length of time as the corporation itself is permitted to do business, remains the property of the company only until the dissolution or the expiration of its charter, and after this is neither the property of the corporation nor of its stockholders, but reverts to the state. This property does not, therefore like the tangible property of a corporation, pass to its stockholders, subject to the rights of creditors, for the obvious reason that the franchise as originally granted, was limited to twenty years. It is no answer to this proposition to say that the corporaton is deprived of that which is valuable, for the corporation is deprived only of that which by implication, it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise the result would be that a toll road company, which under our statute is, limited to twenty years, might indefinitely prolong its existence and perpetuate its franchise, contrary to the express provision of section 11, article 2 of our bill of rights, which prohibits the irrevocable grant of franchises by the General Assembly (see section 15, article 2, Constitution of Missouri); for just before the termination of its corporate existence, its stockholders could (as attempted to be done here) form a new corporation to which the property and franchise of the

old one would be transferred and the business continued, and when this second corporation was about to expire a third one could in like manner be formed, and so on for all time; and thus indirectly the legislative will could be thwarted, and the constitution, with impunity, evaded, and the perpetuation of franchises be accomplished and a monopoly established, contrary to the letter and spirit of our law. The authorities, so far as called to our attention, or as we have examined them, are in harmony with this conclusion. In addition to those already cited, there are Turnpike Co. *vs.* Ills. 96 U. S. 63; State *vs.* Lake, 8 Nev. 276; Blood *vs.* Woods, 95 Cal. 78, 30 Pac. 329; Thompson on Corporations section 5938; State
154 *vs.* Lawrence Bridge Company, 22 Kan. 438." The learned counsel for the defendant in this case, has with much industry distinguished the facts in the Ralls County case 138 Mo. 332 from those in the case at bar, one of which is that in that case the turnpike was constructed originally on a previously established public highway by and with the consent of the County Court. But the conclusion reached by this court in that case was not based upon the exceptional facts therein, but upon the general law applicable in this case as in that of any other case in which the turnpike company is incorporated with the right to take tolls for a limited period, and when such charter right expires, the highway becomes disburdened of tolls and is a free public highway thereafter. And by such conclusion, in no manner, as said in the Colorado case from which we have quoted so freely, no property right of the company is taken for which it is entitled to compensation. In view of the well settled law on this subject, it must be held that the contract of the state with the Cape Girardeau and Scott county Macadamized Road Company terminated on February 24, 1903, and the road constructed by it on that day ceased to be a toll road, but its character as a public highway remained, and the public is now entitled and was on that date entitled to its free use without the payment of tolls. And it follows as a necessary corollary that on May 27th, 1903, the said Cape Girardeau and Scott County Macadamized Road Co. had no right, title or interest in said public highway other than its toll gates, houses and personal property which it could convey to the present defendant, The Scott County Macadamized Road Co. and nothing passed by the attempted transfer between the said companies. It is too well settled to admit of discussion that the first company only obtained an easement over the said right of way and not a fee simple title to the land. Venable *vs.* Wabash Ry. Co. 112 Mo. 103; State *ex rel. vs.* The Gravel Road Co., 138 Mo. 345; 346; Kellog *vs.* Malin, 50 Mo. 499; Chouteau *vs.* Ry. Co. 122 Mo. 385. And Moreover there was no such corporation as the Cape Girardeau and Scott
155 County Macadamized Road Company in existence at that date capable of making a conveyance of such right of way. Bradley *v.* Reppell, 133 Mo. 545. And for a further reason that before said attempted conveyance was executed, the franchise and road bed which the deed purported to pass had already vested in the public free from any power of said defunct corporation to affect a transfer thereof. Learned counsel in the brief have assailed

the constitutionality of the act of April 3, 1901, but as that act is simply declaratory of the law as had already been decided by this court, we are not impressed with any of the objections alleged against its validity. Much of the brief of the counsel for the defendant is devoted to the evidence for the purpose of showing that Cape Girardeau and Scott Counties had no title by prescription to the highway prior to the incorporation of the Cape Girardeau and Scott County Macadamized Road Company, but according to the views already expressed that was a matter of indifference. The petition in the case is also assailed on several grounds, one is that it does not charge that this particular road belonged to the public, but a reference to the petition will show that it defines this particular road as a public highway, and then alleges that it is now and has been a public highway for more than thirty years, and that the defendant without right or authority maintains on and across said highway at various points designated therein certain bars and obstructions commonly known as toll gates and prevents the public from making free and proper use of said highway, and that said obstructions constitute a continuous public nuisance, and prays that the same be abated and the defendants enjoined from further maintaining the same. This is a clear and concise statement of all the facts necessary to be alleged. Another objection to the petition is that it fails to charge that the stockholders had ever been reimbursed or that the public or any one else had ever offered to pay them back the money they had invested in the road. A complete answer to this — that there is nothing in the act or in the general law which imposes any such obligation upon the public. In People *vs.* David-
156 son, 79 Cal. 165, 21 Pac. Rep. 538, it was said quoting from Craig *vs.* The People, 47 Ills. 487, "It is claimed for appellant that before his road can be declared a free public highway, he must be paid an equitable sum for his interest in it. But by his own acts and presumedly with full knowledge of the law, appellant turned over to the public the use of this land for a road and vested in the public an irrevocable easement. It is not a case therefore, where private property is sought to be taken for public use without just compensation. In some states compensation is made to toll road owners at the expiration of their charters, but in those states it is expressly provided by law that such compensation shall be made." No such provision is made by law in this state. And the theory of our law is that the original incorporators unquestionably estimate that the privilege of collecting tolls for fifty years would fully compensate them for their investment in the construction of the road, whether or not their expectations will be or have been realized does not concern the state or its officers.

The conclusion of the whole matter is that the judgment of the Circuit Court in granting a perpetual injunction against the obstruction of this highway was proper, and it is affirmed.

Fox, P. J. and Burgess, J. Concur.

JAS. B. GANTT, *J.*

157 And afterwards to-wit, on the 13th day of June, 1907, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Pros. Att'y, Resp.,
v.
SCOTT CO. MACADAMIZED ROAD CO., App.

Comes now the said appellant by attorney, and files its motion to transfer this cause to the court in banc.

Which said motion to transfer to Court in Banc is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, March Term, 1907.

No. 12667.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Comes now the appellant in the above styled cause, and who is the losing party, and moves the court to transfer said cause to the Court in Banc for its decision therein. And for cause for this motion says that a federal question is involved.

R. G. RANNEY,
Attorney for Appellant.

Cape Girardeau, Mo. June 12th, 1907.

Messrs. T. D. Hines and R. L. Wilson, attorneys of record in the above cause.

158 GENTLEMEN: I beg to advise you that I will present the above motion to the Supreme Court at ten o'clock of the morning of the 15th of June, 1907, or rather to Division No 2 of said court, or as soon thereafter as I can be heard.

Very truly yours,
R. G. RANNEY,
Attorney for Appellant.

Received a copy of the above motion and notice this the 12th day of June, 1907.

T. D. HINES,
Of Counsel for Respondent.

And afterwards to-wit, on the 1st day of July, 1907, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Resp.,
v.
SCOTT CO. MACAD. ROAD CO., App.

Now at this day, it is ordered by the court that this cause be transferred to the Court in Banc.

And afterwards to-wit, on the 8th day of October, 1907, the fur ther following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Resp.,
v.
SCOTT COUNTY ROAD CO., App.

Comes now H. E. Alexander, Prosecuting Attorney, and enter his appearance as attorney for the respondents herein.

Which said entry of appearance is in words and figures as follows to-wit:

159 In the Supreme Court of the State of Missouri, October Term 1907.

No. 12667.

STATE *ex Rel.* T. D. HINES, Pros. Att'y, Respondent,
versus
SCOTT COUNTY MACADAMIZED ROAD CO., Appellant.

I herewith file my appearance in the above entitled cause as one of the Attorneys for respondent.

H. E. ALEXANDER,
Prosecuting Attorney, Cape Girardeau County, Missouri.

And afterwards to-wit, on the 22nd day of October, 1907, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* T. D. HINES, Pros. Att'y, Resp.,
v.
SCOTT CO. MACADAM ROAD CO., App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards to-wit, on the 6th day of November, 1907, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Appeal from St. Francois County Circuit Court.

160 Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Francois County Circuit Court rendered, be in all things affirmed

and stand in full force and effect; and that the said respondent recover against the said appellant his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

161 In the Supreme Court of Missouri, Division No. 2, April Term, 1907.

12667.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

This is a proceeding *ex officio* by the Prosecuting Attorney of Cape Girardeau county to perpetually enjoin the defendant, its officers, agents, servants, successors and assigns from maintaining a public, continuing nuisance by obstructing a public highway in said county, known as the Scott County Road and sometimes as the Rock levee across the Big Swamp from the City of Cape Girardeau to the bluffs in Scott county, by maintaining on and across said highway, toll gates and exacting toll from the public who have occasion to use said highway. The petition alleges that said road is a public highway and has been such for more than thirty years; that the defendant is a corporation organized under the laws of this state, and without authority it maintains on and across said highway at various points, bars and obstructions commonly called toll gates, and that it prevents the public from making free and proper use of such highway and that such toll gates are a continuous public nuisance. By consent of parties, a change of venue was granted to St. Francois county. The defendant then filed an amended answer to plaintiff's petition. This amended answer consists of a general denial and an affirmative defence that no portion of said road was ever a free public highway, and that the public never had any interest in said highway; that said toll gates and tolls collected are authorized by law; that the defendant is a corporation duly organized and as such is authorized to own a turnpike road as above described, and that the portion of this road that passes across the Big Swamp was constructed in the years 1853 and 1855 by its grantor, "The Cape Girardeau and Scott
162 County Macadamized Road Company" That in the years 1872 and 1873, the said last named company procured its right of way along the north side of said swamp by condemnation, donation and purchase and finished the construction of its road to the City of Cape Girardeau, that said road so constructed to the City of Cape Girardeau was maintained and kept in repair from the time of its construction up to the present time by defendant and its grantor; that the same has been used as a public thoroughfare, travelers thereon paying the tolls at all these times fixed and exacted; that the expenditures for maintaining said road have about equalled the receipts from tolls; that dividends to stock-holders have been very small, not enough to reimburse them for the outlay for the construction of said

road; that the said Cape Girardeau and Scott County Macadamized Road Company was created by act of the Legislature, approved February 24, 1853, that by the provisions of said Act, said Macadamized Road Company was granted the exclusive privilege of constructing a macadamized road across the Big Swamp in the county of Cape Girardeau, with the privilege of extending the same to the City of Cape Girardeau, and that said company should have perpetual succession as such, and that at any time after the expiration of twenty years, the counties of Cape Girardeau and Scott should have the right to purchase said road for the purpose of making the same a free road, but that in the event that said sale should be made, the said counties of Cape Girardeau and Scott should pay to said company the actual cost of the construction of the same. That relying upon said Act, believing that the terms and provisions thereof would be upheld and carried out by the State, said Company went to work as soon as could be done after the passage of this Act, to construct and build, and during the years 1853, 1854 and 1855, did build and construct said road and complete the same across the Big Swamp, in accordance with the requirements of said act, and afterwards in the year 1873, did extend the said road to the City of Cape Girardeau; that said road was built by said company at great expense for labor
163 and material to-wit, thirty thousand dollars; that said company was at all times willing to sell said road to said counties in accordance with requirements of said act, but said counties wholly failed and refused to buy said road. And defendant further alleges that it acquired from the said Cape Girardeau and Scott County Macadamized Road company, by issuing to the stockholders of the said company fifteen thousand dollars of the paid up capital stock of this defendant for said road.

Defendant further answering says that the proceedings of plaintiff under this petition violate Sections 4, 15, 21, 30 and 32 of Article 2 of the Constitution of the State of Missouri, and section 9, paragraph 3, and section 10, Article 1, section 4, Article 4, and the 5th and 14th amendments of the Constitution of the United States, which provides that the private property, to-wit, the property of this defendant, cannot be taken without due compensation and process of law, and defendant pleads said several sections and provisions of the Constitution of the United States and the State of Missouri in bar to the pretended cause of action set up in the petition and proceedings of the plaintiff in this behalf instituted. The defendant for further answer says that it purchased the said road for the sum of fifteen thousand dollars in its fulls paid up capital stock, which was delivered to the last board of directors and trustees of the Cape Girardeau and Scott county Macadamized Road Company, and defendant avers that under the laws of the State of Missouri, after the expiration of the charter of the Cape Girardeau and Scott county Macadamized Road Company the last board of directors and trustees of said company had good right to sell and convey the private property and assets belonging to said Cape Girardeau and Scott County Macadamized Road Company to a new company organized for the purpose of owning said road; and that it was the well settled policy, established by the laws of this state to authorize a conveyance of the property
164 belonging to said corporation whose charter had expired to convey its property to a new corporation organized in that

behalf. And defendant denies that the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company have ever been reimbursed in full or for any part of the capital invested by it in the construction of the said road, and that under the laws of this state said company was authorized to transfer all the property it owned at the time of the expiration of its charter to another corporation organized to take over and operate the said road, and this defendant avers that for valuable consideration it has acquired the said road and all the assets, land and property of the said company and is now the lawful owner thereof and in lawful possession thereof and has acquired a fee and title in fee simple to the said road and right of way sixty feet wide from the owners of the fee adjacent and bordering upon the said road and that plaintiff has no interest or right to the said road in law or equity. And having fully answered prays that the temporary injunction be dissolved and the defendant be discharged with its costs. To this answer a reply was filed denying all the new matter set up in the answer and especially pleaded that by the Act of February 24th, 1853, the Cape Girardeau and Scott County Macadamized Road Company had authority to build a macadamized road from Cape Girardeau to Scott county and keep the levee aforesaid for a period of fifty years; that said right expired on the 24th of February, 1903, whereupon the said road so constructed by said company was and became a free public highway disburdened of the right of said Macadamized Road Company to take tolls thereon; that said macadamized road company had no power of authority to acquire any fee simple title whatever, and its only right was to acquire an easement or rights of way for the purpose of said road; and that it did not acquire any fee simple title to the road bed and had no authority to sell to this defendant or any one else its right to take tolls or its road bed; that the stockholders of the said
165 macadamized road company after the expiration of its charter in order to deprive the public of its free public highway, organized a new corporation know as the "Scott County Macadamized Road Company," and caused a pretended conveyance to be made by the last board of directors of the old company of the roadway, property and franchises of the said Cape Girardeau and Scott County Macadamized Road Company to this defendant. That the defendant Company had no assets; that no money was paid for its capital stock and the whole transaction was a scheme contrived to attempt to perpetuate the wrongful and unlawful claim to take tolls forever over the road aforesaid. And relator avers that the entire road now claimed by the defendant from Cape Girardeau to the north end of the levee across the levee in Scott county was by its construction and opening to the public, dedicated by the company constructing it, to the public, and thereby became and was and has ever since been a public highway used by the public at all times subject only to the right of the former company to maintain toll gates up to February 1903. And that after the expiration of the charter of the said Cape Girardeau and Scott County Macadamized Road Company, all the roadway, rights and franchises of said company vested in the public and said road became a free public highway by operation of law, and the defendant is unlawfully obstructing said highway by its

toll gates to the great injury of the public, and again prays judgment for a perpetual injunction.

Upon the trial the following facts were developed. By the Act of the Legislature approved February 24th, 1853, (Laws of Missouri 1853; page 337) "The Cape Girardeau and Scott County Macadamized Road Company" with the capital stock of fifteen thousand dollars was created a body politic. The company was given "The exclusive privilege of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, where said swamp commenced below the City of Cape Girardeau and ran across said swamp a distance of three or four miles, with the privilege of extending the same to the City of Cape Girardeau."

166 In the years 1853, 1854 and 1855 the road across the swamp was constructed, toll gates erected and it has been operated as a toll road ever since. In the early seventies the road was extended as contemplated by the act to the City of Cape Girardeau, and this extension also has been operated as a toll road up to the present time. The right of way for a part of the last constructed road was obtained by condemnation proceedings. It does not appear that the Cape Girardeau and Scott County Macadamized Road Company ever obtained any portion of the right of way by any kind of deed of conveyance, except in one instance. By the 8th section of the act *of* provides that "The privileges granted in this charter shall continue for fifty years, provided that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road." And by the first section of the Act it was provided that said Macadamized Road Company "May and shall have perpetual succession as such, and may make and use a common seal, and the same to alter at pleasure." From the time this turnpike road was first constructed it has been used continuously by the public as a thoroughfare and highway, subject only to the right of the said company to take and collect tolls fixed by the 7th section of the said Act. On May 26th, 1903, the defendant, the Scott County Macadamized Road Company filed articles of incorporation with the Secretary of State to exist for a period of fifty years. The article- allege: "That the undersigned have formed themselves into a corporation for the purpose of constructing and owning a macadamized and gravel road under article 5, chapter 12 R. S. 1899." The road described in the article- is the same as had recently been operated by the Cape Girardeau and Scott County Macadamized Road Company. On May 27th, 1903, a contract was entered into signed by Louis Houck, President of the Cape Girardeau and Scott County Macadamized Road Company, and Giboney Houck, president of the Scott County Macadamized Road Co. the purpose being to consolidate the two companies under

167 section 1221 R. S. of Missouri, 1899. Since May 27th, 1903, the defendant has been operating said toll road and is now engaged in operating same and taking toll from travelers thereon. On May 27th, 1903, Louis Houck, and others, directors and managers of the Cape Girardeau and Scott County Macadamized Road

Company prior to the 24th day of February, 1903, in consideration of one dollar and the issuance to the various stockholders of the Cape Girardeau and Scott County Macadamized Road Company of shares of its capital stock equal to the number of shares held by each of the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company, conveyed to defendant, the real estate, property, assets, rights and franchise of the Cape Girardeau and Scott County Macadamized Road Company, including its road bed and right of way, toll gates, etc. A quit claim deed from K. H and W. L. Killibrew was made to the Cape Girardeau and Scott County Macadamized Road Company, dated June 17th, 1892, "to hold for the purpose of operating and owning thereon a macadamized and gravel road for-ver, either by itself or its successors or assigns, provided however if at any time said gravel road company or its successors or assigns should abandon said gravel road and business of operating and running the gravel road over the said strip of ground, that then the said strip of ground shall revert to the parties of the first part or their assigns." There were also other quit claim deeds to the defendant covering various other portions of the right of way of said road. There was also much documentary evidence and testimony of witnesses offered on the question as to whether a public highway had existed along the route of the road in question prior to the year 1851. No records were offered showing the establishment of a county road by order of the county court, but the evidence did tend to show that the portion of the road crossing the Big Swamp or what was known as the rock levee was traveled by the public prior to the construction of this toll road. The circuit court after a full hearing rendered a decree for the plaintiff perpetually enjoining the defendant, its officers, agents, servants, successors and assigns from

168 further maintaining toll gates on and across said road and from in any way interfering with the public in the free use of said highway.

1. At the threshold of the consideration of this appeal, we are met with the suggestion of the plaintiff that this court is without jurisdiction to determine it for the reason that no constitutional question is involved in its determination. It will be observed that the defendant in its answer assails this proceeding on the ground that if permitted it would be a denial of due process of law and an impairing of the obligation of its contract with the state and a taking of its property without just compensation and pleads the sections of the Constitution which guarantees that immunity. Counsel for plaintiff in urging that this court is without jurisdiction insists that that question cannot arise for the reason that the state is not seeking to recover the toll houses gates and other personal property of the defendant, but is asking only that its citizens be permitted to travel over the surface of this highway without payment of unlawful toll. It is true that this is the purpose of the action, but it is also true that defendant asserts a fee simple title in the road and at least a right to an easement over it, and that this proceeding would impair the obligation of the contract with the state and of its grantor, which if sustained by this court would necessarily defeat the injunction, and

while it may be that upon a full investigation of these questions, the result will be reached that no constitutional right of the defendant has been or will be infringed or impaired by this proceeding or the judgment of the Circuit Court. We are of the opinion that a constitutional right is sufficiently asserted under all the circumstances to put the jurisdiction in this court instead of the court of appeals. If transferred to the court of appeals, these same questions would be presented there, and that court must necessarily decide first, whether a constitutional question was raised, and second, whether there was merit in it. While we have ruled that we will look sufficiently deep into the record to ascertain whether jurisdiction prop-
169 erly belongs to this court and will not entertain it merely because some section of the constitution is named, still where the question is mooted and we can see that the constitutional question must be passed upon even though adversely, we think it is our duty to hold jurisdiction of the case, and accordingly we shall dispose of the appeal on its merits in this court.

2. In State *ex rel. vs.* The Hannibal and Ralls County Gravel Company, 138 Mo. 332, without discussion a proceeding by injunction to restrain a corporation whose charter had expired from charging and taking tolls upon a public highway, was sustained. Afterwards in State *ex rel. vs.* Gravel Road Company, 187 Mo. 439, the propriety of that ruling was questioned, but as it was ruled in that case, that this court had no jurisdiction of the appeal and as a majority of the court did not concur in the views of Judge Marshall that *quo warranto* was the only remedy for such a wrong, and that as it was a legal remedy, injunction would not lie, it cannot be considered that the decision in State *ex rel. vs.* Gravel Road Co., 138 Mo. 332, has been authoritatively disapproved by this court, or either division thereof. After the case of State *ex rel.* Jump *vs.* The Gravel Road Company *et al.*, was transferred by this court to the Court of Appeals, that court in the 116 M. A. 175, held that injunction was a proper remedy to prevent a continuing public nuisance and it was proper for the prosecuting attorney of the county to institute such a proceeding *ex officio*. The court of appeals while conceding that the state might have proceeded by *quo warranto* against the corporation to oust it of its charter and franchise, proceeded to take up the question on principle whether injunction could also be resorted to, and reached the conclusion that the great weight of authority in this country, as well as in England, was to the effect that in addition to the remedy at law by *quo warranto*, it is now settled that a court of equity may take jurisdiction in cases of public nuisances upon information filed by the Attorney General or other proper officer authorized to represent the State.
170 Thus in City of Georgetown *vs.* Alexandria Canal Company 12th Peters 91, the Supreme Court of the United States sustained the jurisdiction of the court of equity, on the ground that equity can give more adequate and complete relief than can be obtained at law. In Attorney General *v.* Jamacia Pond etc., Co. 133 Mass. 363, it was said: "Cases are numerous in which it has been held that the attorney general may maintain an information in

equity to restrain a corporation, exercising the right of eminent domain, from any abuse or perversion of its powers which might create a public nuisance or injuriously affect or endanger public interests." Agar *vs.* The Regent's Canal Co., Coop. Temp. Eldon, 77; Attorney General *vs.* Great Northern R. R. Co., 1 Dr. & Sm. 154; Attorney General *vs.* Mid-Kent R. R. Co., L. R. 3 Ch. 100; Attorney General *vs.* Great Eastern R. R. Co., 11 Ch. d. 449; Attorney General *vs.* Great Northern R. R. Co., 4 DeG. & Sm. 75; Attorney General *vs.* Cohoes Co., 6 Paige 133; People *ex rel. vs.* Newburg Plank Road Co., 86 N. Y. 1. As said by the court of appeals, "if the collection of the tolls was nuisance, maintained in the public highway, then it was the right of the public to have such nuisance abated or restrained forthwith and it was the duty of the State in its sovereign capacity to institute such proceeding in that behalf as would render to its citizens immediate reinstatement of a free and unincumbered highway. A proceeding by *quo warranto* would have been of a tedious nature where the relief sought could only be adjusted upon a final determination of the cause, whereas a proceeding by injunction would afford immediate and adequate relief inasmuch as the restraining order of the court could be had forthwith, and the otherwise constant and recurring nuisance be thereby abated during the pendency of the suit, the ultimate result being the same in either proceeding. And indeed, the daily practice of unlawfully exacting tolls from those persons using the road was a standing and continuing infringement of their rights, which could be immediately relieved only by the extraordinary process of injunction, and upon each successive exaction of toll, a right of action arose in favor of the person who was required, to pay the same against those persons so unlawfully exacting it, which could be adjusted between the parties only by a multiplicity of suits at law." We have no doubt whatever, that this proceeding by the prosecuting attorney *ex officio* to abate this public and continuing nuisance was and is the proper remedy. Since the decision of this court in State *ex rel. vs.* The Gravel Road Co., 138 Mo. 332, the Legislature of this State, at the regular session in 1901, enacted a new section to chapter 151 of article 5 of the R. S. 1899, known as section 9547, which provides: "The control and management of all graveled or macadamized roads of this State, which may have been originally constructed by any corporation, whether organized under special act of the Legislature or under general law, whose charter life has expired or may hereafter expire shall immediately pass to and vest in the county court in which such road may be situated, and in all cases where such corporation, whose charter life has expired by limitation or otherwise, is in the possession of and in control of such roads, and is collecting tolls thereon, it shall be the duty of the prosecuting and circuit attorneys of the respective counties or circuits through which such road or roads may run to prosecute suits in the name of the state at the relation of such attorneys to enjoin, restrain and prohibit such corporations from collecting such tolls, and such suits may be prosecuted in the name or names of one or more citizens of such counties or circuits who reside in the vicinity of such roads

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and travel over the same, and in case the prosecuting or circuit attorneys fail or refuse upon request to prosecute the same, any citizen may in the name of the State at the relation of said citizen prosecute such suits to the same extent and in the same manner as the circuit or prosecuting attorney could have done." Laws of Missouri 1901 page 235. It would seem that neither our learned brother who wrote the opinion in State *ex rel. vs.* Gravel Road Co., 187
172 Mo. 439, nor the court of appeals when preparing its opinion in the same case in the 116 M. A. 175 had his or its attention called to this new act, which evidently was intended to embody in the statute law of this state the principles approved in State *ex rel. vs.* Gravel Road Company 138 Mo. 332, and State *ex rel. vs.* Gravel Road Company, 37 M. A. 504.

3. The defendant insists that the Act of February 24, 1853, incorporating the Cape Girardeau and Scott County Macadamized Road Company, Laws of Missouri 1853 chapter 337, conferred upon it continuous and uninterrupted succession and that the charter of the said company did not expire on February 24, 1903, by limitation, or in other words, at the end of the fifty years prescribed by the 8th section of said Act, for its existence. The learned counsel concedes that this court in State *ex rel. vs.* Payne, 129 Mo. 468 settled the law adversely to its contention, and that, that case was followed and approved in State *ex rel. vs.* The Gravel Road Company, 138 Mo. 332, in which cases it was held that the words "perpetual succession" implied nothing more than a continuous succession during the existence of the corporation as is fixed by its charter. But we are asked by the learned counsel to review those decisions and to hold that notwithstanding the limitation in the act for the exercise of the privileges conferred, that the words "perpetual succession" created a perpetual charter in the Cape Girardeau and Scott County Macadamized Road Company. We have read with interest the argument of the learned counsel, and the authorities to which they refer, but have not been convinced that our previous rulings in the cases just cited were incorrect; on the contrary, we are more than ever satisfied with the absolute soundness of the conclusions reached in those decisions upon this point and that they correctly overruled Fairchild *vs.* The Masonic Hall Association 71 Mo. 526. Chancellor Kent in 2nd Kent's Com. 267, long ago announced the true meaning of the words perpetual succession in corporate charters, wherein he says:
"It is sometimes said that a corporation is an immortal as
173 well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal that it is well known that most of the private corporations recently created by statute are limited in duration to a few years." In the 7th American and English Ency. of Law (2nd. Ed.) page 684, it is well said, "When it is said that one of the distinguishing features of a corporation is the capacity of perpetual succession, this must be understood to mean a potential not an actual perpetuity; a capacity, as contradistinguished from partnerships and other voluntary associations, to continue in existence indefinitely, up to the period of its constitutional or statutory limitation, in spite of the

withdrawal or death of any of its members." And in 10 Ency. of Law and Procedure, page 148, it is laid down that these words, "perpetual succession" mean in a general sense that the corporation is endowed with the faculty of existing forever unless the same or another statute or the constitution has fixed and limited to the term of its existence. In other words, the terms "perpetual succession" is understood to mean indefiniteness of duration, and do not refer to length of time but rather convey the idea of regularity or unbroken continuity of existence." See also Field on Corporations section 57, Ang. and Ames on Corporations section 8. So that it must be held that by the limitation in the 8th section of the act incorporating the Cape Girardeau and Scott county Macadamized Road Company, the charter of that road expired on the 24th of February, 1903.

4. But it is insisted that notwithstanding the charter of the Cape Girardeau and Scott county Macadamized Road Company expired on the 24th of February, 1903, that fact did not and could not impair or destroy the title of the said corporation in the said macadamized road and it must be regarded as property within the meaning of both the state and the federal constitutions and that the last board of directors of said corporation as trustee for the said corporation had the capacity and power to convey the
174 same to the defendant herein or to consolidate with the defendant herein and thereby transfer the title for the road to the present defendant company, which is incorporated to build and own a toll road. And that this proceeding seeks to deprive the defendant of its property in said road, which it acquired from said defunct corporation, without due process of law and without compensation.

To rid this question of all confusion, it may be well to remark that by this proceeding, the state does not claim or seek to recover by this action, the toll houses, gates or other personal property of the appellant, but seeks only to restrain and prohibit the defendant from any longer obstructing this road, which the state insists became on the 24th of February, 1903, a free public highway disburdened of the public and continuing nuisance of toll gates across the same and the exaction of illegal tolls by the defendant, its agents, servants and employees. And thus we are brought to the real contention in this case, to-wit, what was the character of the rights acquired by the Cape Girardeau and Scott County Macadamized Road Company under its charter of 1853. By reference to the Act itself, it will be seen that this corporation was created for a public purpose, to-wit, that of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, with the privilege of extending the same to the City of Cape Girardeau, with the privilege of taking tolls from all persons who should travel thereon and to enforce the collection of the same by erecting gates or turn *pikes* to obstruct the passage over said road until the tolls fixed by the act were paid. And the right to exercise this privilege was expressly limited to fifty years. No power was granted to said corporation to obtain a fee simple title to the land over which said road should be constructed. The only right granted to it was to obtain an easement or right of way for its said proposed road. The nature and character of turn-

pike roads was fully examined in State *ex rel. vs.* Gravel Road Company, 138 Mo. 332. It was there said "Now a turnpike is
175 a highway differing neither in the responsibility for its proper maintenance nor in any other particular from an ordinary highway, save in the mode of constructing and maintaining it. An ordinary public road is maintained and repaired by taxes, a turnpike is supported and maintained by the tolls exacted. A turnpike is regarded in law as a public easement and not as private property. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway. These principles are well established. Com. *vs.* Wilkerson, 16 Pick. 175; Craig *vs.* People 47 Ill. 487. The public character of the easement is made more manifest when the charter of such companies permits the condemnation of real estate in acquiring their right of way as was granted by the act of 1851, section 8, page 261. Knox Co. *vs.* Kennedy, 92 Tenn. 1. And as if to emphasize this view it has often been ruled that when the charter permitted the use of an established highway for a turnpike it imposed no additional burden upon the adjoining landowners by changing the highway into a toll road, on the principle that the character of the easement was not changed, the road remaining a public highway. Carter *vs.* Clark, 89 Ind. 238; Chagrin Falls & Cleveland Plank Road *vs.* Cane, 2 Ohio, St. 419; Panton Pike Co. *vs.* Bishop, 11 Vt. 198; Callison *vs.* Hedrick, 15 Grat. 244; Douglas *vs.* Boonsborough Turnpike Road Co., 22 Md. 219; Wright *vs.* Carter, 27 N. J. L. 76; Walker *vs.* Caywood, 31 N. Y. 51." And in that same case, the question now presented arose and was determined, and it was said "Having reached this point (to-wit, the date on which the charter rights of the company expired) we are confronted with the question what becomes of the turnpike or plank road after the franchise expires? We think that the weight of authority and sound reason concur in holding that upon the termination of the franchises the road remains as before a public highway, wholly free from the burden of tolls. Particularly is this true when, as under our statute, the turnpike company merely acquires an easement in the road during its charter life, and not a fee in the land on which the road is laid out. The
176 easement in a turnpike as well as in an ordinary road is vested in the public and when the turnpike company's charter expires, its easement ceases, but the easement of the public continues until revoked by law. State *vs.* Maine, 27 Conn. 641.

In Pittsburgh, etc., R. R. *v.* Com. 104 Pa. St. 583, the Supreme Court of Pennsylvania states the law in these words: 'The question is, did the forfeiture of the charter of the turnpike company wholly destroy the character of the road as a public highway? The right of the company to take tolls was ended. Its liability to keep the road in repair was terminated, yet the road as a public highway remained. No judgment or decree had destroyed its character as such. It had been dedicated to public use. The forfeiture of the charter of the turnpike company destroyed the rights of that corporation, yet the road still remained, in fact and in law, a public highway.' Craig *vs.* The People 47 Ill. 495. And in McMullin *vs.* Leitch, 83 Cal. 239, it was held that the road becomes a public high-

way by dedication at the time of its construction subject to the rights of the company to collect the tolls for the period prescribed by statute and at the termination of such period neither the company or stockholders have any interest in the road for which they are entitled for compensation. 27 Am. & Eng. Ency. of Law 324, *et seq.*" In addition to the authorities above quoted the learned circuit Judge who tried this cause has added others, among which is People *ex rel.* Vivian *vs.* Virginia Canon Toll Road Co., 45 Pac. Rep. 398; 22 Colo. 429; In that case a company was formed in 1865 for the purpose of establishing a toll road. The company's existence was for a term of twenty years. In 1881 the respondent company was formed for the purpose of acquiring and did acquire as far as they could be alienated, all the rights, property and franchises of said first company. This action was brought in 1896, to exclude the respondent from its assumed franchise to collect tolls, and that the corporation be dissolved. A demurrer to the petition was overruled, which action of the lower court was sustained by the Supreme Court.

The court through Campbell, J., among other things, says:

177 "A toll road is a public highway, differing from ordinary public highways chiefly in this, that the cost of its construction in the first instance is borne by individuals or by a corporation, having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof, constitute a dedication of the same as a public highway. The right of a corporation or of an individual to exact toll is not of common right, and, in this country, does not exist in the absence of a grant from the Legislature. The power of collecting tolls is a part of the sovereign power of the state, which the Legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with any restrictions which the Legislature may see fit to impose, and the grantee takes subject to all such limitations; and the grant of the right is the equivalent of, or compensation for, the cost of building and maintaining the road. * * * But if we assume that the wagon road company might alien its franchise to collect tolls, and that the defendant toll road company now has, by purchase, all the tangible property of the former company and also the franchise to exact tolls which its grantor possessed, it must logically follow that as the result of such acquisition the grantee company has only the same powers which its grantor had, and no different or enlarged powers. In other words, whatever limitations or burdens existed against the grantor still exists as against the grantee. The inquiry then is, what is the extent of the powers of the wagon road company? Under the territorial act of incorporation the wagon road company's existence as a corporation expired in 1885. It was then legally dissolved as a corporation, and was thereafter incapable of exercising its franchise to collect toll. Neither could it, by a conveyance made during its incorporate life, impart to any other corporation, or to a natural person, the power to continue the exercise of its corporate franchise after that franchise itself expired

by limitation of law. The limitation in the general incor-
178 poration act of the territory of twenty years as the term of existence of the company operates in the same way as though by expressed words the exercise of the power to collect tolls was limited to twenty years. Elliot, Roads & S. 83; Am. & Eng. Ency. Law 324 *et seq.* But plaintiff in error insists that its property is valuable only in case it has the right to collect tolls, and, therefore, that such use of its property is of itself a property right, and unless there is some way whereby it can enjoy this use of its property after its corporate life has ended, practically it is deprived of its property without due process of law. The argument proceeds upon a false premise. In the eye of the law, the toll road was dedicated by its owner as a public highway. While in one case (People *vs.* Newburgh & S. Plank road Company, 87 N. Y. 1) it was held that if a private corporation owns the fee on which the way exists, the public does not acquire the right to use the way upon the expiration of the charter, which decision has been said to be contrary to the weight of authority (Elliot Roads & S. 54,) yet where the corporation has only an easement, as is the case here, and not the fee, the authorities are unanimous that upon the expiration of the charter the way becomes a public highway. 27 Am. & Eng. Enc. Law, *supra* and cases cited. The easement in, or the right to pass over, the roadway which the corporation laid out, belongs to the public, subject to the necessity of paying tolls only for such length of time as the corporation exists. The contract between the state and the corporation contained in the charter, or resulting from the act of incorporation under the general laws, is that the corporation shall possess during its corporate life the power of collecting tolls, which is regarded as a compensation and a full equivalent for the cost of construction and operating the road. The corporation accepts the grant subject to this condition, and supposing at least, that the business will prove remunerative. This right to collect tolls, not belonging to the corporation either as a matter of common right or for an indefinite time, as a grant
179 from the Legislature, but for such length of time as the corporation itself is permitted to do business, remains the property of the company only until the dissolution or the expiration of its charter, and after this is neither the property of the corporation nor of its stockholders, but reverts to the state. This property does not, therefore like the tangible property of a corporation, pass to its stockholders, subject to the rights of creditors, for the obvious reason that the franchise as originally granted, was limited to twenty years. It is no answer to this proposition to say that the corporation is deprived of that which is valuable, for the corporation is deprived only of that which by implication, it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise the result would be that a toll road company, which under our statute is, limited to twenty years, might indefinitely prolong its existence and perpetuate its franchise, contrary to the express provision of section 11, article 2 of our bill of rights, which prohibits the irrevocable grant of franchises by the General Assembly (see section 15, article 2, Constitution of Missouri); for just before the

termination of its corporate existence, its stockholders could (as attempted to be done here) form a new corporation to which the property and franchise of the old one would be transferred and the business continued, and when this second corporation was about to expire a third one could in like manner be formed, and so on for all time; and thus indirectly the legislative will could be thwarted, and the constitution, with impunity, evaded, and the perpetuation of franchises be accomplished and a monoply established, contrary to the letter and spirit of our law. The authorities, so far as called to our attention, or as we have examined them, are in harmony with this conclusion. In addition to those already cited, there are Turnpike Co. *vs.* Ills. 96 U. S. 63; State *vs.* Lake, 8 Nev. 276; Blood *vs.* Woods, 95 Cal. 78, 30 Pac. 329; Thompson on Corporations
180 section 5938; State *vs.* Lawrence Bridge Company, 22 Kan. 438." The learned counsel for the defendant in this case, has with much industry distinguished the facts in the Ralls County case 138 Mo. 332 from those in the case at bar, one of which is that in that case the turnpike was constructed originally on a previously established public highway by and with the consent of the County Court. But the conclusion reached by this court in that case was not based upon the exceptional facts therein, but upon the general law applicable in this case as in that of any other case in which the turnpike company is incorporated with the right to take tolls for a limited period, and when such charter right expires, the highway becomes disburdened of tolls and is a free public highway thereafter. And by such conclusion, in no manner, as said in the Colorado case from which we have quoted so freely, no property right of the company is taken for which it is entitled to compensation. In view of the well settled law on this subject, it must be held that the contract of the state with the Cape Girardeau and Scott county Macadamized Road Company terminated on February 24, 1903, and the road constructed by it on that day ceased to be a toll road, but its character as a public highway remained, and the public is now entitled and was on that date entitled to its free use without the payment of tolls. And it follows as a necessary corollary that on May 27th, 1903, the said Cape Girardeau and Scott County Macadamized Road Co. had no right, title or interest in said public highway other than its toll gates, houses and personal property which it could convey to the present defendant. The Scott County Macadamized Road Co. and nothing passed by the attempted transfer between the said companies. It is too well settled to admit of discussion that the first company only obtained an easement over the said right of way and not a fee simple title to the land. Venable *vs.* Wabash Ry. Co. 112 Mo. 103; State *ex rel. vs.* The Gravel Road Co., 138 Mo. 345; 346; Kellog *vs.* Malin, 50 Mo. 499; Chouteau *vs.* Ry. Co. 122 Mo. 385. And Moreover there was no such corporation as the Cape Girardeau and Scott County Macadamized Road
181 Company in existence at that date capable of making a conveyance of such right of way. Bradley *v.* Reppell, 133 Mo. 545. And for a further reason that before said attempted conveyance was executed, the franchise and road bed which the deed pur-

ported to pass had already vested in the public free from any pow
of said defunct corporation to affect a transfer thereof. Learn
counsel in the briefs have assailed the constitutionality of the act
April 3, 1901, but as that act is simply declaratory of the law as ha
already been decided by this court, we are not impressed with an
of the objections alleged against its validity. Much of the brief
the counsel for the defendant is devoted to the evidence for the pu
pose of showing that Cape Girardeau and Scott Counties had
title by prescription to the highway prior to the incorporation of t
Cape Girardeau and Scott County Macadamized Road Compan
but according to the views already expressed that was a matter
indifference. The petition in the case is also assailed on sever
grounds, one is that it does not charge that this particular road
longed to the public, but a reference to the petition will show that
defines this particular road as a public highway, and then alleg
that it is now and has been a public highway for more than thir
years, and that the defendant without right or authority maintai
on and across said highway at various points designated therein c
tain bars and obstructions commonly known as toll gates and p
vents the public from making free and proper use of said highwa
and that said obstructions constitute a continuous public nuisan
and prays that the same be abated and the defendants enjoined fro
further maintaining the same. This is a clear and concise sta
ment of all the facts necessary to be alleged. Another objection
the petition is that it fails to charge that the stockholders had ev
been reimbursed or that the public or any one else had ever offer
to pay them back the money they had invested in the road. A co
plete answer to this — that there is nothing in the act or in the ge
eral law which imposes any such obligation upon the publ
182 In People *vs.* Davidson, 79 Cal. 166, 21 Pac. Rep. 538, it w
said quoting from Craig *vs.* The People, 47 Ills. 487, "It
claimed for appellant that before his road can be declared a fr
public highway, he must be paid an equitable sum for his inter
in it. But by his own acts and presumedly with full knowledge
the law, appellant turned over to the public the use of this land f
a road and vested in the public an irrevocable easement. It is n
a case therefore, where private property is sought to be taken f
public use without just compensation. In some states compensati
is made to toll road owners at the expiration of their charters, b
in those states it is expressly provided by law that such compensati
shall be made." No such provision is made by law in this sta
And the theory of our law is that the original incorporators u
questionably estimate that the privilege of collecting tolls for fif
years would fully compensate them for their investment in the co
struction of the road, whether or not their expectations will be
have been realized does not concern the state or its officers.

The conclusion of the whole matter is that the judgment of t
Circuit Court in granting a perpetual injunction against the
struction of this highway was proper, and it is affirmed.

Fox, P. J. and Burgess, J. Concur.

JAS. B. GANTT, *J.*

183 In the Supreme Court of Missouri, October Term, 1907.

In Banc. No. 12667.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Per Curiam:

Upon a rehearing of this cause by the Court in Banc, the foregoing opinion of Gantt, C. J. in Division No. 2 is adopted. Burgess, Valliant, Fox, Lamm, Graves and Woodson, JJ. concurring therein.

184 And afterwards, to-wit, on the 27th day of November, 1907, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Relator,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Now at this day, comes the said appellant and presents to the Honorable James B. Gantt, Chief Justice of the Supreme Court of the State of Missouri, in Chambers, a petition for a writ of error to the Supreme Court of the United States, *a writ of error to the Supreme Court of the United States*, a citation directed to said respondent, citing and admonishing him to appear at a Supreme Court of the United States on the 8th day of December, 1907, an assignment of errors and a bond in the sum of One thousand dollars, which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond approved, ordered filed and made a part of the record herein.

Which said petition for a writ of error to the Supreme Court of the United States is in words and figures as follows, to-wit:

The Supreme Court of the State of Missouri. In Equity.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,

vs.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

185 The petition of the Scott County Macadamized Road Company by Giboney Houck and R. G. Ranney, attorneys, hereby sets forth that on or about the 5th day of November, 1907, the Supreme Court of the State of Missouri made and entered a final order judgment and decree herein in favor of the State of Missouri

ex rel. T. D. Hines, prosecuting attorney of Cape Girardeau county, and against the Scott County Macadamized Road Company, in which final order, judgment, decree and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the said Scott County Macadamized Road Company, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the state of Missouri is the highest court of the said state of Missouri in which a decision in this suit and this matter could be had.

Wherefore, the said Scott County Macadamized Road Company petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the state of Missouri for the correction of errors so complained of, and that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 8th day of November, 1907.

R. G. RANNEY AND
GIBONEY HOUCK,
Attorneys for Scott County Macadamized Road Company.

And which said assignment of errors is in words and figures as follows, to-wit:

186 In the Supreme Court of Missouri. In Equity.

STATE OF MISSOURI *ex Rel.* T. D. HINES, Prosecuting Attorney of Cape Girardeau County, Respondent,
vs.
SCOTT COUNTY MACADAMIZED ROAD COMPANY, Appellant.

Assignment of Errors.

The appellant and defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to wit:

I. The Court erred in affirming the ruling of the State circuit court in overruling defendant's objection to the introduction of any testimony, for the reason that the petition does not state facts sufficient to constitute a cause of action.

II. The Court erred in affirming the ruling of the State circuit court in overruling defendant's demurrer to the evidence.

III. The Court erred in holding that the only right the Cape Girardeau & Scott County Macadamized Road Company had to its right-of-way was the franchise of taking tolls.

IV. The Court erred in holding that the said Cape Girardeau & Scott County Macadamized Road Company had no property rights in its right-of-way which it could devolve upon defendant.

V. The Court erred in holding that the road-bed, bridges, culverts,

and superstructure of broken stone, constructed by defendant's grantor, is not tangible property.

VI. The Court erred in holding that the road-bed, bridges and superstructure of broken stone, constructed by the Cape Girardeau & Scott County Macadamized Road Company, is now the property of the public.

VII. The Court erred in construing the charter granted to
187 the Cape Girardeau & Scott County Macadamized Road Company.

VIII. The court erred in failing to construe the 8th section or provision of said charter.

IX. The Court erred in failing to give said 8th section the force and effect it was intended to have, to wit: That the counties of Cape Girardeau and Scott should be required to pay the defendant the actual cost of building the road.

X. The Court erred in failing to apply the rules of construction of statutes, as provided by section 4160 of the Revised Statutes of Missouri, 1899, page 996, which is mandatory.

XI. The Court erred in failing to follow the rules adopted by the courts in the construction of contracts.

XII. The Court erred in holding that the word "perpetual," found in the charter of the Cape Girardeau & Scott County Macadamized Road Company, qualifies the word "succession," also found in said charter, in the sense of limiting the duration of the succession of said company.

XIII. The Court erred in holding that said charter expired on the 24th day of February, 1903.

XIV. The Court erred in holding that the corporate life of said charter was expressly limited to fifty years.

XV. The Court erred in holding that the right to collect tolls was one of the privileges granted in the charter, and which were expressly limited to fifty years.

XVI. The Court erred in failing to hold that the *exclusive* privileges mentioned in said charter were the only privileges intended to be limited to fifty years.

XVII. The Court erred in failing to consider the conditions of the country at the time said charter was granted, the character of the soil, the character of the road which was built, the necessities of the road and the purpose of the same, in ascertaining the intention of its promoters to establish a road for a brief period only or for an indefinite time.

XVIII. The Court erred in failing to ascertain and declare
188 what the intentions of the contracting parties to said charter were, as ascertained from the language of the charter and the surrounding facts and circumstances attending the building of the road.

XIX. The Court erred by its judgment and decree in depriving defendant of its vested rights, and which judgment and decree is in violation of section 10, article I of the Constitution of the United States.

XX. The Court's judgment and decree is in violation of article V

of the amendments to the Constitution of the United States in this, that it provides for the taking of defendant's private property for public use without just compensation.

XXI. The Court's judgment and decree is in violation of article XIV of the amendments to the Constitution of the United States in this, that it provides for depriving defendant of its property without due process of law.

XXII. The Court erred in holding that this proceeding is due process of law.

XXIII. The Court erred in holding that the act passed by the Legislature of the State of Missouri on the 3rd day of April, 1901, entitled an "Act to repeal section 9547 of article 5, chapter 151 of the Revised Statutes of Missouri, 1899, etc., is not unconstitutional.

XXIV. The Court erred in holding that said act is not in violation of section 10, article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

XXV. The Court erred in holding that the proceedings of plaintiff under his petition do not violate sections 4, 15, 21 and 30, article 2 of the Constitution of the State of Missouri, and of section 10, article 1 of the Constitution of the United States.

XXVI. The Court erred in holding that defendant's toll gates, constitute a public nuisance.

XXVII. The Court erred in holding that the equities of the case are with the plaintiff.

189 XXVIII. The Court erred in deciding that the incorporators of the Cape Girardeau and Scott County Macadamized Road Company had been reimbursed for the money paid by them when the evidence proved the reverse.

Wherefore, the defendant prays that the judgment of the Supreme Court may be reversed.

GIBONEY HOUCK &
R. G. RANNEY,
Attorneys for Defendant.

And which said Bond is in words and figures as follows, to-wit:

Know all men by these presents, That we, Scott County Macadamized Road Company as principal, and —— —— as sureties are held and firmly bound unto State of Missouri, *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau County, in the full and just sum of One thousand ($1000.) Dollars, to be paid to the said State of Missouri, *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals and dated this 27th day of November, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, lately at the October Term, A. D. 1907, of the Supreme Court of Missouri, in a suit depending in said Court between State of Missouri, *ex rel.* T. D. Hines, Prosecuting Attorney of Cape Girardeau County, Respondent, and Scott County Macadamized

Road Company Appellant, Judgment was rendered against the said Appellant, and the said Appellant having obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Respondent, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now, the Condition of the above obligation is such, that if
190 the said Appellant shall prosecute said writ to effect and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

SCOTT COUNTY MACADAMIZED ROAD CO., [SEAL.]
By GIBONEY HOUCK, *Pres.* [SEAL.]
LOUIS HOUCK. [SEAL.]
M. E. LEMING. [SEAL.]
GIBONEY HOUCK. [SEAL.]

Sealed and delivered in presence of

GEO. E. CHAPPELL,
Clk. Cape Girardeau Court of Common Pleas, Cape Girardeau Co., Mo.

Approved by

JAS. B. GANTT,
Chief Justice Supreme Court of Missouri.

191 STATE OF MISSOURI, *set:*

I, John R. Green, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete copy of the record entries and proceedings had in a certain cause wherein the State of Missouri, *ex rel.* T. D. Hines is respondent and Scott County Macadamized Road Company is appellant, as fully as the same remains of record and on file in my office.

In testimony whereof, I have hereunto set my hand, and the seal of said Court hereto affixed. Done at office in the City of Jefferson, this 3rd day of December, 1907.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 20,968. Missouri supreme court. Term No. 565. Scott County Macadamized Road Company, plaintiff in error, *vs.* The State of Missouri *ex rel.* T. D. Hines, prosecuting attorney of Cape Girardeau County. Filed January 13th, 1908. File No. 20,968.

—IN THE—

SUPREME COURT

—OF THE—

....UNITED STATES....

OCTOBER TERM, 1907.

SCOTT COUNTY MACADAMIZED ROAD COMPANY,
Plaintiff in Error,

vs.

STATE OF MISSOURI, EX REL T. D. HINES,
Prosecuting Attorney of Cape Girardeau County,
Defendant in Error.

No. 

Motion to Dismiss Writ of Error and Counter Suggestions on Motion for Supersedeas.

T. D. HINES,
M. A. DEMPSEY,
For Defendant in Error.

R. L. WILSON,
HARRY ALEXANDER,
Prosecuting Attorney
Of counsel.

—IN THE—

SUPREME COURT

—OF THE—

....UNITED STATES....

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—IN THE—

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Plaintiff in Error,

vs.

STATE OF MISSOURI, EX REL T. D. HINES,
Prosecuting Attorney of Cape Girardeau County,
Defendant in Error.

No. [illegible]

And now comes the defendant in error and says that the motion for an order suspending the injunction should be denied, for the following reasons:

1. Although by the affirmance of the decree of the court below, its injunction is now and has been ever since the affirmance in full force and effect, as plaintiff and its officers well know, yet the said plaintiff in error is now and has been ever since said affirmance maintaining its toll gates and collecting tolls contrary to the express injunction contained in the final decree and is now in contempt of the very order sought to be suspended.

2. The judges of the Supreme Court of the State of Missouri, before whom the cause was twice argued, familiar with the facts and the legal questions involved, have exercised the discretion referred to in Rule 93 and have declined to order a suspension of the injunction. Matters resting in discretion are not reviewable unless it is apparent that there has been an abuse of discretion. There is no showing here of any abuse of discretion.

3. The motion here is in terms for "a supersedeas, suspending the injunction;" in other words for an original order issuing from this court, operating directly upon the Circuit Court of St. Francois County and the parties to the suit; for a supersedeas issued in this case, unaccompanied by a special order staying the injunction, would absolutely have no effect in staying the injunction. The motion calls for the exercise of extraordinary power, inherent in this court but only to be call-

ed into action when justified by unusual circumstances, such as are not present in this case.

4. The injunction should not at this stage of the proceedings be stayed, either by supersedeas or an original order, without an adequate examination of the transcript of the record, and a conviction based thereon that there is substantial merit in the contentions of plaintiff in error.

5. The Supreme Court of the United States has in reality no jurisdiction of the subject matter involved in the writ of error, although it has technical jurisdiction for the purpose of ascertaining if it has actual jurisdiction. The grounds for the assertion of federal jurisdiction are of the most unsubstantial character, and have been forcibly injected into the case for the purpose of longer delaying the full measure of relief sought by our bill. Suspend the injunction and the full purpose of the writ of error is accomplished.

6 The mere assertion does not confer jurisdiction; it is apparent even from the brief statement of facts in the motion filed that no federal question is involved. The charter of defendant in error contained a limitation that the privileges granted should continue for fifty years, with a provision that they could be sooner terminated at any time after twenty years (by purchase.) The Circuit Court of St. Francois County so construed

it; Division No. 2 so construed it; the Supreme Court in banc so construed it; nowhere is there a dissent. The charter construed was a contract between the state and the defendant in error involving no matter of federal concern; the judgment was an expression of judicial opinion rendered after full hearing and mature consideration of the issues involved. The court found that no property of the defendant was being taken, that the charter rights of the toll gate company had expired by limitation, and that the public were entitled to free access to the highway. Due process of law has been followed at every stage; plaintiff in error has had its day in court. If the facts in this case warrant an intervention of federal jurisdiction, then the federal court may be compelled to pass upon every case arising in the state courts, where a litigant alleges that the proceedings are in contravention of the constitution.

7. Upon this motion all reasonable intendments must be drawn in favor of the finding and decision of the Circuit Court of St. Francois County and the affirmance thereof by the Supreme Court of the State of Missouri.

8. The further suspension of the injunction in this case would operate as an injustice to travelers upon the public highway. It would deprive them of rights which after a full hearing upon the merits have been adjudicated to be theirs, and no bond required by this court

would compensate them fully for a deprivation of those rights or secure a return to the many individuals of the numerous small sums exacted for toll. According to judicial determination the plaintiff in error has for five years been perpetrating a wrong by exacting toll for the use of a public highway; suspension of the injunction would merely continue the injustice. Courts should guard themselves from being made instruments of oppression.

9. The injunction originally authorized was stayed by stipulation, pending decision of the state Supreme Court. After obtaining the advantages accorded them, the attorneys for plaintiff in error violated the stipulation in letter and in spirit, and we are of the opinion that they should, for that reason alone be barred, from longer enjoying the benefits of the stay order. One of the conditions of delaying putting the injunction in full force was that attorneys for plaintiff in error would cooperate with us in endeavoring to obtain a speedy hearing of the appeal, by joining in a motion to advance the cause. After the cause had been docketed the motion was prepared and presented to the attorney who had made the stipulation, the attorney being also president of the toll gate company, and he declined to join in the motion, no reason for his action being assigned. One of the purposes of the stipulation was to preserve the status quo pending appeal, which counsel now deem so important; yet after Division No. 2 had rendered its

opinion affirming the action of the court below, and before the cause was submitted to the court in banc, the same attorneys who appeared for the company filed a bill in the federal Circuit Court, two stockholders being plaintiffs, praying for an injunction against the relator, the judges of the County Court, the present prosecuting attorney, and the inhabitants of the district generally, the purpose and effect of the proceeding being to nullify as an ultimate object the results obtained in the state cases. The said bill was *upon motion* made at the return day and argued by counsel on both sides, stricken from the files *on the ground of collusion.*

10. There is no error in the record. The finding and decision of the courts is in harmony with all the decisions in which similar questions were involved and there is nothing in the record which justifies this court preventing the decree for injunction having the usual effect pending appeal as is provided by statute.

Wherefore the defendant in error says the motion of plaintiff in error should be denied.

T. D. HINES,
M. A. DEMPSEY,
For Defendant in Error.

R. L. WILSON,
HARRY ALEXANDER,
Prosecuting Attorney
Of counsel.

COUNTER MOTION TO DISMISS WRIT OF ERROR.

And now comes the defendant in error and moves that the writ of error be dismissed for lack of jurisdiction and in support of said motion urges:

1. That no federal question is involved in the controversy.

2. That the record clearly shows that no constitutional right has been infringed.

3. Due process of law has been followed in the proceeding.

4. The question of jurisdiction may be raised at any stage of a case.

Wherefore defendant in error prays that the writ of error be dismissed at the costs of plaintiff.

T. D. HINES,
M. A. DEMPSEY,
For Defendant in Error.

R. L. WILSON,
HARRY ALEXANDER,
Prosecuting Attorney
Of counsel.

In the Supreme Court of the United States.

SCOTT COUNTY MACADAMIZED ROAD CO.,
Plaintiff in Error,
vs.
STATE OF MISSOURI, EX REL ETC.,
Defendant in Error.

T. D. Hines being duly sworn deposes and says that he is the relator in the above entitled cause and makes this affidavit for the information of the Court as to certain facts not otherwise appearing of record; that the plaintiff in error is now, notwithstanding the injunction order in this cause, openly, notoriously and ~~continuously~~ maintaining its toll gates and collecting toll; that lately, on the 30th day of December, 1907, the relator had occasion to and did travel over the highway in question, in the usual course of business and was then required to pay and did pay for so doing the sum of fifty cents; that the gate keeper then stated in response to a question that he was collecting toll, generally, from travelers upon the highway.

Respondent further says that stay of execution of the writ was had in accordance with the terms of a stipulation entered into by the parties, one of the conditions of which was that the attorneys for plaintiff in error should join in a motion to advance the cause in the Supreme Court; that deponent is informed by Mr.

Dempsey, one of the attorneys for defendant in error that he prepared such a motion, and handed same to Giboney Houck, president of plaintiff in error and one of its attorneys of record, and that he declined to join in the motion, assigning no reason for his refusal.

Deponent further says that after the decision was rendered by Division No. 2, affirming the decree and before the cause was heard by the court in banc, two stockholders of the plaintiff in error, who pending the litigation had moved to the state of Wisconsin, filed a bill in the federal Circuit Court at St. Louis, against relator, the judges of the County Court of Cape Girardeau County, the present prosecuting attorney and the inhabitants of the federal judicial district generally, the ultimate purpose of which was to procure an injunction which would nullify the results obtained in the state courts; and that said bill was upon motion, after argument of counsel, stricken from the files on the ground of collusion.

T. D. HINES.

Subscribed and sworn to before me, this 4 day of January, 1908.

Henry Pula

Notary Public

Seal

ARGUMENT.

The statement of facts contained in the printed motion does not clearly state the present status of the injunction order; nor does it clearly appear from said motion why the ordinary supersedeas would not suffice, but the court is requested to issue a supersedeas *suspending the injunction.* The real reason is that the injunction was not stayed, ipso facto, by the appeal to the Supreme Court, nor was its suspension in any way involved in the matters decided by that court. That being so, the supersedeas only operating directly upon the order of the Supreme Court, it would leave untouched all matters strictly pertaining to the enforcement of the injunction. Therefore to secure the result desired by plaintiff in error it will be necessary to call into exercise an extraordinary power, which counsel admits is but seldom used and for all ordinary cases has been delegated by Rule 93, to a judge who takes part in the decision of the cause.

After the decree for injunction was entered by the Circuit Court of St. Francois County, a stipulation was filed which provided in substance that the writ of injunction itself, should not issue until the Supreme Court of Missouri decided the questions to be raised on ap-

peal. And it was accordingly so ordered. But it follows that, the contingency fixed by the stipulation having come to pass, the decree is now and has been ever since the final decision of the Supreme Court of the State of Missouri in full force and effect, and the injunction writ in the cause is peculiarly under the control of the court of original jurisdiction. We do not undertake to say that this court has not the power to make a direct order affecting the rights and controlling the conduct of the parties to this cause; but we do assert that so to do would be a departure from the usual and well established course and would not be warranted by the facts in the case at bar. There are here no special facts appealing to the conscience of the court. The plaintiff in error is not only treating with contempt the order of the Circuit Court in this cause, but its act in maintaining toll gates upon the public highway after the expiration of its charter is a criminal violation of the laws of Missouri. It seeks by this application to obtain some sort of judicial sanction for its unlawful acts. The usual practice as fixed by Rule 93, when the operation of the decree for injunction is sought to be stayed, pending appeal, is to make application to a judge who participated in the trial, and his action upon the motion is wholly a matter of discretion. In the present instance application was made to Judge Gantt, Chief Justice of the Supreme Court of the State of Missouri, who rendered the opinion of the court. The case has been twice

fully orally argued; Judge Gantt was thoroughly familiar with the facts and the legal propositions involved. He gave the application careful consideration; he consulted thereon with the other members of the court. "*And they were of the opinion that no such supersedeas should be granted any way.*" No abuse of judicial discretion is asserted, and yet after having elected their course and failed of their object they ask this court to overrule the action of Judge Gantt, alleging that he was mistaken as to the law. The disappointed litigant always charges that the judge who decides against him is mistaken either as to the facts or the law.

The order for injunction is at the present time just as fully and effectively in force as it will be should this motion be denied. The plaintiff in error has full knowledge of the command of the court and is responsible for legal knowledge of its obligations thereunder. And yet plaintiff in error contemptuously disregards the injunction and continues to take toll, while it comes into this court and asks apparently as a matter of good form that the writ be suspended.

"Where an injunction has been ordered, a party having knowledge of that order, who deliberately violates the injunction that has been ordered although not yet issued, is guilty of contempt of court."

Dowagiac Mfg. Co. vs. Minnesota Moline Plow Co., 124 Fed., 736.

And we deem it unnecessary to argue that one in contempt of court has no standing to make an application of this character, without first being purged of the contempt.

As to the effect of the injunction pending appeal, we refer the court to State ex rel Busch vs. Dillon, 96 Mo., 56, a contempt case.

We respectfully submit that the case at bar is not one which calls into being the exercise of federal jurisdiction and we have therefore filed a counter motion to dismiss the writ of error. We believe that a careful reading of the opinion rendered by our Supreme Court will convince this court that the matters involved peculiarly belong to the local courts. The mere allegation that a constitutional right is infringed does not establish that as a jurisdictional fact. If the court will give our counter motion consideration and sustain it, the parties to the cause will be saved much unnecessary expense, delay will be avoided, and it is needless for this court to investigate in detail the numerous authorities pertinent to the merits of the case as presented to the state courts.

The only question in the case really is the one arising from the construction of the limitation section of the charter. Said section is as follows: "The privileges granted by this charter shall continue for fifty years; provid-

ed, that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter, purchase said road at the actual cost of construction, and make it a free road." The Circuit Court and the Supreme Court construed it as an absolute limitation to fifty years, found that the period of the charter rights had expired, and that the plaintiff in error should be enjoined from collecting tolls. The matter at issue is merely the construction of the terms of a contract; there is nothing in that contract of federal concern. The court having jurisdiction of the parties and the subject matter renders a decision based on a construction of the contract and makes an order for the enforcement of its judgment which is the usual order in cases of this character. The losing party asserts that the decision of the court is wrong and therefore that its property is being taken without due process of law. If federal jurisdiction can be injected into a case in this forcible way, what is there to prevent the Supreme Court of the United States from being compelled to take appellate cognizance of any and every case arising in the state courts, involving the construction of a contract, where the pleadings contain an allegation that a constitutional right is being infringed. It is of course of the highest importance that constitutional rights should be protected; but to justify an appeal to this court that it exercise its function to preserve a sacred right there should be something more than a faint tinge

of color to the jurisdiction. State courts have their function of protecting constitutional rights; that protection was invoked in this cause; the court found that no constitutional right was involved. A casual examination will, we think, convince the court, that the state courts were right on this proposition and that, the facts not justifying any action by this Supreme Court, the writ of error should be dismissed.

That the remedy pursued in this case is sanctioned by the statutes of the state and previous decisions of its court we refer to Sessions Laws of 1901, page 235, and State ex rel etc. vs. Hannibal & Ralls County Gravel Road Co., 138 Mo., 332. That due process of law has been observed we cite the following list of cases in which similar question are decided. They are all toll gate cases; the decisions are uniform and consistent. The Court will note how persistently the turnpike companies have hung on to the prerogative of taking toll after their right so to do has expired.

People ex rel Vivian vs. Virginia Canon Toll Road Co., 45 Pac. Rep., 398. (Col.)

Benedict vs. Gait, 3 Barb., 499.

Davis vs. Mayor of New York, 14 N. Y., 516.

St. Clair Co. Turnpike Co., vs. Illinois, 96 U. S., 63.

Elliott, Roads and Streets, 54.

Campbell on Highways, No. 8, p. 8, No. 14, p. 11.

27 Am. and Eng. Encyc. of Law, 320.

Pittsburgh, etc vs. Com., 104 Pa., 583.

State vs. Lake, 8 Nev., 276.

State vs. Curry, 6 Nev., 75.

State vs. Dayton, 10 Nev., 115.

Wood vs. Truke Co., 24 Cal., 474.

Craig vs. People, 47 Ill., 487.

Police vs. Jury, 44 La., A., 137.

Hayward vs. Mayor, 8 Barb., 492.

Hooker vs. Utica, 12 Wend., 371.

State vs. Passiac, 42 N. J. L., 524.

State vs. Mayor, 29 N. J. L., 441.

Jersey City vs. State, 30 N. J. L., 521.

State vs. Atlantic City, 34 N. J. L., 99.

State vs. Leith, 83 Cal., 239.

Dawes vs. Hawkins, 8 C. B. N. S., 857.

State vs. Western, etc., 95 N. Car., 602.

Kansas vs. Lawrence, 22 Kan., 438.

Blood vs. Woods, 95 Cal., 78.

People vs. Davidson, 21 Pac., Rep., 538.

State vs. Maine, 27 Conn., 647, 71 Am. Dec., 89

Central Bridge vs. Lowell, 15 Gray, 106.

People vs. Newburg, 86 N. Y., 302.

Heath vs. Barrymore, 50 N. Y., 302.

For the foregoing reasons we respectfully submit that not only should their motion be denied, but that in

the interest of justice and for the proper facilitation of the business of this court the writ of error should be dismissed.

T. D. HIXES,
M. A. DEMPSEY,
For Defendant in Error.

R. L. WILSON,
HARRY ALEXANDER,
Prosecuting Attorney
Of counsel.

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Office Supreme Court, U. S.
FILED.
JAN 13 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

SCOTT COUNTY MACADAMIZED ROAD COMPANY,
Plaintiff in Error.

vs.

STATE OF MISSOURI, Ex Rel. T. D. Hines, Prosecuting Attorney of Cape Girardeau County,
Defendant in Error.

No. [redacted].

MOTION FOR SUPERSEDEAS AND BRIEF IN SUPPORT OF SAME.

EDWARD S. ROBERT,
Attorney for Plaintiff in Error.

R. G. Ranney,
Giboney Houck,
Robert & Robert,
Of Counsel.

J. W. Steele & Co., Prs., 16 N. Third, St. Louis.

IN THE

Supreme Court of the United States.

SCOTT COUNTY MACADAMIZED ROAD COMPANY,
Plaintiff in Error.

vs.

STATE OF MISSOURI, Ex Rel. T. D. Hines, Prosecuting Attorney of Cape Girardeau County,
Defendant in Error.

No.

MOTION FOR SUPERSEDEAS PENDING THE APPEAL.

The plaintiff in error, Scott County Macadamized Road Company, respectfully shows to the Court that this is a suit for an injunction, brought in the State's name, at the relation of T. D. Hines, Esquire, the Prosecuting Attorney of Cape Girardeau County, to restrain the Scott County Macadamized Road Company from collecting tolls on a turnpike located in Cape Girardeau and Scott Counties, Missouri.

The company claims the right to collect tolls by virtue of a charter granted on February 24th, 1853, to the Cape Girardeau & Scott County Macadamized Road Company, a corporation that conveyed all of its rights to the plaintiff in error. The charter was a special act of the legislature,

under which the Cape Girardeau & Scott County Macadamized Road Company constructed the toll road in question. It and its grantee, the plaintiff in error, collected tolls until enjoined in this case.

It is contended by Mr. Hines, representing the County of Cape Girardeau, that the right to collect tolls expired on February 24th, 1903, fifty years after the passage of the act creating the Cape Girardeau Company, and this view was sustained by the Circuit Court and the Supreme Court of the State of Missouri.

It is contended by the Scott County Macadamized Road Company, plaintiff in error, that under the terms of the charter, the public could not appropriate the road without paying the original cost thereof, and that the Cape Girardeau Company had the right to convey the turnpike to the Scott County Company, as it did in 1903, and the Scott County Company had the right to collect tolls under the general law until the counties of Cape Girardeau and Scott paid the original cost of construction of the pike.

The plaintiff in error contends that the construction put upon the charter by the Missouri courts impairs the obligation of the contract, and is in violation of Article I, Section 10 of the Constitution of the United States, for the reason that Section VIII of said charter, which is the only part of it pertinent to this motion, provided that:

"8. The privileges granted in this charter shall continue for fifty years: provided, that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or any time thereafter, purchase said road at the actual cost of construction, and make it a free road."

The Supreme Court of Missouri took the view that the public was entitled to the turnpike without any payment for

it, and enjoined the plaintiff in error from collecting tolls from the traveling public for the use of the same.

Now, therefore, in consideration of the premises, the plaintiff in error does hereby move the Court to make an order suspending the operation of the injunction restraining the plaintiff in error from collecting tolls on said road until the determination of the cause by this Honorable Court, and for reasons for said motion, state the following:

First. That application was made to the Chief Justice of the Supreme Court of the State of Missouri to supersede said injunction pending this appeal, and he erroneously took the view that he had no power to make such order.

Second. That if said suspension of said injunction is not effected by the order of this Court and the plaintiff in error prevails in this action, there is no way by which it can recover the tolls that should be paid during the pendency of this appeal and the same will be forever lost to plaintiff in error.

Third. That by fixing a bond in an adequate amount, this Court can protect all of the parties using said road, pending the final disposition of the case.

Fourth. It is unjust to plaintiff in error not to suspend said injunction pending the appeal, as the road is expensive to maintain and the counties will neglect it, and if this plaintiff in error prevails the roadbed will be greatly depreciated at the termination of the litigation, and it would be unjust to require the plaintiff in error to keep it in repair while denying it the right to collect tolls.

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Attorney for Plaintiff in Error.

R. G. RANNEY,
GIBONEY HOUCK,
ROBERT & ROBERT,
Of Counsel.

COPY OF MR. CHIEF JUSTICE GANTT'S LETTER REFUSING THE SUPERSEDEAS.

State of Missouri,

Office Clerk Supreme Court,

Jefferson City, Nov. 28, 1907.

"R. G. Ranney, Esq., Cape Girardeau, Mo.

My Dear Sir: I have this morning, allowed the writ of error to the Supreme Court of the United States in the case of State ex rel. T. D. Hines v. The Scott County Macadamized Road Company.

The Clerk of the Court will send you a citation to be served upon Mr. Hines, and will notify you when the transcript is ready to be forwarded to the Clerk of the Supreme Court of the United States.

After consideration, I have concluded that I have no power to make the supersedeas bond in this case, act as a stay of the injunction granted by the Circuit Court and affirmed by this Court. I did consult with the members of the Court and they were of the opinion that no such supersedeas ought to be granted any way. Accordingly the mandate will be sent down notwithstanding your appeal to the Supreme Court.

Very respectfully yours,

JAS. B. GANTT."

BRIEF OF THE PLAINTIFF IN ERROR IN SUPPORT OF ITS MOTION FOR SUPERSEDEAS PENDING THE APPEAL.

I.

A writ of error does not stay, reverse or nullify the operative effect of a decree granting an injunction.

Knox Co. v. Harshman, 132 U. S. 14 (33 Law Ed. 249).

Leonard v. Ozark Land Co., 115 U. S 465 (29 Law Ed. 445).
Hovey v. McDonald, 109 U. S. 150 (27 Law Ed. 888).
Slaughter House cases, 10 Wall. 273 (19 Law Ed. 915).

II.

Pending an appeal either the trial or appellate court has the power to grant a writ of supersedeas.

Knox Co. v. Harshman, 132 U. S. 14 (33 Law Ed. 249).
Leonard v. Ozark Land Co., 115 U. S. 465 (29 Law Ed. 445).
Hovey v. McDonald, 109 U. S. 150 (27 Law Ed. 888).
Slaughter House cases, 10 Wall. 273 (19 Law Ed. 915).
Staffords v. King, 90 Fed. 141.
Am. Strawboard Co. v. Water Co., 81 Fed. 423.
Brewing Co. v. Talbot, 135 Mo. 171.
State ex rel. v. Noonan, 122 Mo. 638.
Neiser v. Thomas, 46 Mo. App. 47.
Thompson v. McKim, 6 Har. & J. 302 (Md.)
Jewett v. Dringer, 29 N. J. Eq. 199.
Dewey v. Court, 81 Cal. 64.

III.

Power should be exercised whenever any irremediable injury will result from the effect of the decree.

Hovey v. McDonald, 109 U. S. 150, l. c. 161.
Staffords v. King, 90 Fed. 141.
Thompson v. McKim, 6 Har. & J. 302.

ARGUMENT.

In the case of Hovey v. McDonald, 109 U. S. 155 (27 Law. Ed. 888), in an appeal from the Supreme Court of the District of Columbia, granting a preliminary injunction, restraining a receiver from carrying out the previous orders of the Court, on a motion for supersedeas, Mr. Justice Bradley said, l. c. 161:

"This Court in the Slaughter House cases, 10 Wall. 273, decided that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the Court said 'It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court,' and held that the same rule applies to writs of error *from State Courts in equity proceedings.* And the decision of the Court was based upon that view of the law. It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. It was not decided that the court below had no power if the purposes of justice required, to order a continuance of the status quo until a decision should be made by the Appellate Court or until the Court should order the contrary. This power undoubtedly exists and should always be exercised when any *irremediable injury* may result from the effect of the decree as rendered; but it is a discretionary power and its exercise or non-exercise is not an appealable matter. In recognition of this power and for the purpose of facilitating its proper exercise in certain cases on appeals from the Circuit Court, this court, by an additional rule of

practice in equity, adopted in the October term, 1878, declared that 'when an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.' (Rule 93.) Of course, where the power is not exercised by the court nor by the judge who allows the appeal, the decree retains its intrinsic force and effect."

In Leonard v. Ozark Land Co., 115 U. S. 465 (29 Law Ed. 445), on the motion for a modification of supersedeas, Mr. Chief Justice Waite said, l. c. 468:

"This court, no doubt has the power to modify an injunction granted by a decree below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October term, 1878, in the case of Sandusky Tool Co. v. Comstock. In finding that such a practice, if permitted, would oft-times involve an examination of the whole case and necessarily take much time, we promulgated the present equity Rule 93. * *"

In the case of American Straw Board Company v. Indiana Water Co., 81 Fed. 423, a decree was entered, enjoining the defendant. Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. Pending the appeal, the defendant presented a motion to the Circuit Court for an order suspending the operation of the decree, which the lower court denied. The defendant then presented a motion for the same order to the Circuit Court of Appeals, and the Court said:

"We entertain no question of the inherent power of this

decree. In Leonard v. Land Co., 115 U. S. 465, such power in the Appellate Court is recognized and asserted as beyond question."

Judge Jenkins then gave the reason for the adoption of Equity Rule 93, and continues:

"It is thus apparent that the Supreme Court, while asserting its power, deemed it advisable to rest the discretion to suspend the operation of a writ of injunction pending appeal from final decree, with the trial judge, establishes the rule that in general the Appellate Court would not, pending the appeal and in advance of a decision of that court upon the merits, interfere with the discretion lodged with the trial judge."

In the case of Hovey v. McDonald, *supra*, Mr. Justice Bradley said, l. c. 159:

"This power undoubtedly exists and *should always be exercised when any irremediable injury may result from the effect of the decree as rendered.*"

In the case of Thompson v. McKim, 6 Har. & J. 302 (Court of Appeals of Maryland, 1825), pending an appeal from a decree in equity, defendant filed a motion to suspend proceedings on the order in the lower court which was denied. He then filed the same motion in the Appellate Court. The Court said, l. c. 333:

"That he had the power to suspend further proceedings on the matter from which the appeal was made on proper and reasonable terms, we have not the smallest doubt, and as little that the same power rests with this court having the right of revision, we have all the powers necessary to the beneficial exercise of that right. Is this then a fit case for the interposition of this court? The order of the chancellor

is that the appellant shall bring into court an amount exceeding $70,000, the use or interest of which sum, amounting to more than $4,000 a year would, by the enforcement of the order pending the appeal, be lost to him, without any benefit whatsoever to the complainants; whereas the injury to the appellant would be irreparable, since in no event of the cause could the lost interest be restored to him, or any compensation for it be made. It is emphatically in such a state of things that the power of this court to cause, by special order, a suspension of proceedings on the matter appealed from, should be exercised and not likely or in every case; but when the court sees that if the decree or order appealed from should turn out to be wrong, the enforcement of it pending the appeal would produce an irreparable injury to the party appealing, it ought and will interpose to prevent such injury or all the purposes of its institution, as an appellate court of chancery, will not be answered."

We feel in this case that this Court should grant a supersedeas pending the appeal, because in the absence of any protection of that sort, the injury to us will be irreparable, as it would be impossible to ever collect the tolls for persons going over the road, while we are awaiting this court's decision. On the other hand, by requiring us to give receipts for tolls paid and a bond, it would be easy to protect the traveling public in case we do not prevail. The road is an expensive one to keep up, going through a swamp, and it would be eminently unfair to let it go to rack and ruin until this litigation terminates, or else force us to keep it in repair without compensation.

If it were only our own opinion that a right, secured to us by the Constitution of the United States, is impaired, our application might be regarded as putting an unreasonable burden on this Court; but with the utmost respect for his Honor, Judge Gantt, we think it inconsistent that he

should grant the writ of error, thereby admitting our contention is worthy of review by this Court, and yet strip us of the property while we are deprived of that right. And while Judge Gantt stated in his letter that he had talked with other members of the Court, and they thought no stay should be granted, that is of no moment in the face of the fact that he expresses the opinion that he had no right to grant a supersedeas; that erroneous view must have prompted his action. That he had the power we think we have demonstrated by the authorities cited, but as he has refused it through a mistaken view of the law, we respectfully ask this Court to grant us a supersedeas, imposing such restrictions as are just toward the traveling public, as above suggested.

Respectfully submitted,

EDWARD S. ROBERT,
Attorney for Plaintiff in Error.

R. G. RANNEY,
GIBONEY HOUCK,
ROBERT & ROBERT,
Of Counsel.

No. 52.

Office Supreme Court, U. S.
FILED.
NOV 26 1909
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

SCOTT COUNTY MACADAMIZED ROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI, ex rel T. D. HINES, Prosecuting Attorney of Cape Girardeau County.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

EDWARD S. ROBERT,
Attorney for Plaintiff in Error.

DOUGLAS W. ROBERT,
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Of Counsel.

J. W. Steele & Co., Prs., 18 N. Third, St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

SCOTT COUNTY MACADAMIZED ROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI, ex rel T. D. HINES, Prosecuting Attorney of Cape Girardeau County.

Injunction.
No. 565.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

This is a suit in equity, instituted by the Prosecuting Attorney of Cape Girardeau County, Missouri, to enjoin the Scott County Macadamized Road Company from maintaining gates and collecting tolls on the road in controversy. It is brought under an act of the Missouri Legislature, approved April 3, 1901. Plaintiff had judgment in the Circuit Court, which was affirmed in the Supreme Court of Missouri.

The plat bound in this brief shows the road in question. There is a difference in the title to that part of the road leading from the letter A on the plat to the letter B; and the title to the road between the letters B and C, the significance of which will be hereafter explained.

The Cape Girardeau and Scott County Macadamized Road Company was incorporated under a special act of the Legislature of Missouri, which was approved February 24th, 1853, as follows:

"Be it Enacted by the General Assembly of the State of Missouri, as follows:

"1. That James Cannon, Wilson Brown, Nathaniel W. Watkins, Thomas Johnson, Abraham Hunter, Peter Byrne and Amasa Alton, and each other person as they may associate with them, and their successors, be and hereby are created a body politic and corporate, by the name and style of the CAPE GIRARDEAU AND SCOTT COUNTY MACADAMIZED ROAD COMPANY, with a capital stock of fifteen thousand dollars, to be divided into shares of fifty dollars each; and may and shall have perpetual succession as such, and may make and use a common seal, and the same to alter at pleasure.

"2. The said company shall have the exclusive privilege of constructing a macadamized road across the big swamp, in the counties of Cape Girardeau and Scott, and running across said swamp a distance of three or four miles, with the privilege of extending the same to the city of Cape Girardeau; said road to be located on what is called the levee, or between the levee and the Missouri River.

"3. Said road shall be constructed with a double or single tract [track], as the company may select; provided, that if constructed with a single tract [track] only suitable and

convenient turnouts or places for wagons shall be provided at intervals of not more than fifty rods.

"4. The affairs of said company shall be managed by a board of five directors, elected biennially, one of whom shall be appointed president; and said board of directors shall be elected by the stockholders, each share of stock entitling the holder to one vote; and said board shall have full power to adopt all by-laws and regulations necessary for the management of the affairs of the company, and for the appointment of any other officers and agents of the company that may be necessary; provided, that no such by-law or regulation shall be repugnant to the laws and constitution of this state.

"5. The County Court of the counties of Cape Girardeau and Scott are authorized to invest any of the funds of said counties in the stock of said company, and may appoint a suitable agent or agents to attend to the interests of said counties in said company, and to vote on all elections of officers of the company.

"6. The stock of said company shall be deemed and held as personal property, and shall be exempt from all taxes for state and county purposes.

"7. The company may erect suitable toll-gates, and charge toll for passing over said road, not to exceed the following rates for the whole distance, to-wit, for each wagon or vehicle drawn by six animals, sixty-five cents; for each wagon or vehicle drawn by four animals, fifty cents; for each wagon drawn by two animals, thirty-five cents; for each wagon or cart drawn by one animal, twenty cents; for a man and horse, ten cents; each pleasure carriage drawn by two horses, forty cents; each pleasure carriage drawn by one horse, twenty cents; for each foot passenger, five cents; for sheep, hogs, yearling cattle, each one cent; for other cattle, mules or horses, each five cents.

"8. The privileges granted in this charter shall continue for fifty years; provided, that the County Courts of the Counties of Cape Girardeau and Scott may, at the expiration of twenty years, or any time thereafter, purchase said road at the actual cost of construction, and make it a free road.

"9. The corporation [corporators] named in this act, or a majority of them, may meet at such time and place, and upon such notice as they may select and agree upon, and organize as a board of directors, make such regulations as they may deem proper for the opening of books for the subscription of stock; and so soon as three thousand dollars is subscribed, shall call a meeting of the stockholders for the election of a permanent board of directors, which board shall hold office for two years, and until their successors are duly elected and qualified.

"This act to take effect and be in force from and after its passage."

We shall call the above company the "Cape Girardeau Company."

On May 26, 1903, the persons owning the stock in said Cape Girardeau Company formed the Scott County Macadamized Road Company, the Plaintiff in Error, under the general incorporation acts of Missouri, particularly Article V of Chapter 12 of the Revised Statutes of 1899. That company will be referred to as the "Scott County Company."

The Articles of Incorporation of this latter company provide, that the name shall be the "Scott County Macadamized Road Company," and "Second. The said road shall begin at the southern city limits of the city of Cape Girardeau and where Sprigg Street terminates, and extend thence in a westerly and southerly direction through sur-

veys No. 2199, No. 2202 and No. 2919," etc., being the route of the toll-road involved in this suit. Also that said road shall be ten miles in length.

The capital stock was fixed at $15,000, and the shares are owned by the same persons that controlled the old.

The toll-road above described was the one owned by the old company, the Cape Girardeau Company, and the shares of stock of the new company, the Scott County Company, were given to the shareholders in the old company as the consideration for the conveyance to the new company of the toll-road in controversy.

The state claims that our Cape Girardeau Company charter expired fifty years after its date, viz.: February 24, 1903; we claim it did not. But, to cover both contingencies, we had the directors of the company, to whom the title to all the company's property passes under the law of Missouri upon the dissolution of a corporation, convey all its right, title and interest in the road and other property to the Scott County Company, and also had the Cape Girardeau Company and the Scott County Company consolidated, so the new company would have all the property the Cape Girardeau Company had left, whether the old charter had expired or not.

The new company, organized, as aforesaid, under the general act relating to toll-roads, collected the tolls prescribed by said general acts and not those prescribed by the old charter (R., pp. 48-51).

In 1901 the Legislature of Missouri passed the following act:

"*Roads and Highways.*—Macadamizing, Grading, etc. Section 9547. The control and management of all graveled or macadamized roads of this state, which may have been

originally constructed by any corporation, whether organized under special act of the Legislature or under general law, whose charter life has expired, or may hereafter expire, shall immediately pass to and vest in the county court of the county in which such road may be situated, and in all cases where such corporation whose charter life has expired by limitation or otherwise is in the possession of and in control of such roads and is collecting tolls thereon, it shall be the duty of the prosecuting and circuit attorneys of the respective counties or circuits through which such road or roads may run to prosecute suits in the name of the state at the relation of such attorneys to enjoin, restrain and prohibit such corporations from collecting such tolls, and such suits may be prosecuted in the name or names of one or more citizens of such counties or circuits who reside in the vicinity of such roads and travel over the same, and in case the circuit or prosecuting attorneys fail or refuse, upon request, to prosecute the same, any citizen may, in the name of the state, at the relation of said citizen, prosecute such suits to the same extent and in the same manner as the circuit or prosecuting attorney could have done. Approved April 3, 1901."

The Prosecuting Attorney of Cape Girardeau County, in pursuance of the provisions of said last mentioned act, of April 3d, 1901, instituted proceedings to enjoin the Scott County Company from maintaining toll-gates or collecting tolls, and asking that the maintenance of said gates and the collection of said tolls be abated as a public nuisance.

The pleadings are as follows:

PLEADINGS.

PETITION. "Plaintiff, for its cause of action, states that beginning at the intersection of Good Hope and Sprigg Streets, in the city of Cape Girardeau, in said county, a pub-

lic highway known as the Scott County Road and sometimes as the Rock Levee Road, runs in a southwesterly direction along the eastern side of the bluff, thence southwestwardly over and across what is known as the Rock Levee, crossing the swamp to the bluffs in Scott County near the Cape Girardeau County line.

"That said road is now and has been a public highway for more than thirty years, and is the main thoroughfare between the city of Cape Girardeau and the town of Benton, the county seat of Scott County, and the town of Kelso and other towns in Scott County; that the defendant is a corporation, organized under the laws of the State of Missouri, and that it, without right or authority, maintains on and across said highway at various points, to-wit, near the city limits of Cape Girardeau and near the northern end of the Rock Levee, certain bars and obstructions, commonly known as toll-gates, and that it prohibits and prevents the public making free and proper use of said public highway.

"Plaintiff further states, that the existence and maintenance of said toll-gates and other obstructions to free travel over said road constitute a continuous public nuisance.

"Petitioner therefore prays that the said nuisance be abated and that the defendant, its officers, agents, servants, successors and assigns, be perpetually enjoined from in any way further obstructing said highway, and from preventing free travel thereover, and for such other and further relief as the Court may deem meet." The court permitted this amendment: "T. D. Hines was, at the time of the filing of this suit, Prosecuting Attorney of Cape Girardeau County, and brings this suit in his official capacity."

THE ANSWER. (R., p. 7.) The answer is in substance as follows: It first traverses all of the allegations in the petition, then continues:

I. Defendant in the first paragraph disclaims any interest in the road within the town limits of Cape Girardeau.

II. Defendant denies that there is, or ever has been, a free public highway known as the Scott County Road or Rock Levee along the route set forth in the petition, particularly over the road owned by the Cape Girardeau Company, or its successor, the Scott County Company. Denies that said road has ever been a free public road for more than 30 years, or any other time, or that the public at large ever had any interest in said highway, and denies that the company maintains the toll-gates without authority of law, but insists it has the right to maintain said gates and to collect said tolls.

III. Defendant says it is a corporation duly organized under the laws of Missouri, with authority to own said macadamized or metal road or turnpike between Scott and Cape Girardeau Counties. That the part of the road across the Big Swamp (from B to C) was constructed in 1853, '54 and '55, by the Cape Girardeau Company on property then owned by Brown, Simeon English and others, and certain lands then owned by the United States. That it was built with the consent of the private owners and without any objection from the United States or the State of Missouri. That the company cleared a right-of-way 60 feet wide, threw up an embankment and levee, ditched the road and macadamized it with stone and other hard metal at great expense. That in the years 1872 and 1873, the Cape Girardeau Company procured its right-of-way to the other part (from A to B) by condemnation, donation and purchase, and in those years constructed its road by clearing it, making an embankment and ditching the same and macadamizing the road from the north end of the Big Swamp (Letter B) to Sprigg Street, in Cape Girardeau (Letter A), and

that no part of any of said roadway was ever a public road at any time.

That prior to the making of said road across the Big Swamp in the years 1853, 1854 and 1855 the thoroughfare between Benton and Cape Girardeau was located elsewhere. That after the building of the Cape Girardeau Company's macadamized and metal road the travel was diverted to said route, it being the only practicable, convenient and cheap method of getting across the Big Swamp in bad weather. That prior to the construction of said macadamized or metal road, in wet weather it was impossible to cross the Big Swamp.

That it cost $30,000 to build said macadamized road. That receipts from tolls for a number of years averaged about $1,400 per annum, all of which was consumed in maintaining the road. That the maintenance was expensive because the soil of the swamp is of a wet, spongy nature, and the stone and gravel placed on the embankment sinks of its own weight, and has to be constantly replaced. That the ground is almost level and to protect the embankment and drain the water it is necessary to extend the ditches into the swamp, that being an additional source of expense. That the swamp is three miles wide and in the time of floods is an outlet for the high water of the Mississippi River. That three times during the past ten years the road has been almost entirely washed away by the high water of the Mississippi River and has been rebuilt at great loss to the company. That the part of the road from Cape Girardeau to the north of the swamp (from A to B), which is four miles long, is expensive to maintain, as it is built along the side of the hills; that from time to time the earth slips down, thereby entailing heavy expense for repairs. That all of said road has been operated at a loss to the shareholders, and only within the last ten years has a divi-

dend of 4 per cent been paid on the capital stock. That nothing was paid in the way of dividends for the first 30 years of the life of the company. That during the Civil War, from 1860 to 1864, said road was used by the United States for transportation of its military arms, artillery and heavy army wagons, which greatly injured said road, and without any compensation. That such use necessitated the reconstruction of said road. That great injury was done said road by the flood of 1858, which passed over it at a depth of 8 feet, washing away all of the macadam; all of which had been replaced before the opening of the war.

IV. Defendant further says that the Cape Girardeau Company was incorporated by the Act of February 24th, 1853 (already set out). That under the provisions of said Act the Cape Girardeau Company was to have the exclusive privilege of building a macadamized road across the Big Swamp, a distance of 3 or 4 miles, with the privilege of extending the same to the city of Cape Girardeau. That the Counties of Cape Girardeau and Scott should have the right to purchase said road for the purpose of making the same a free road; but in the event that said sale should be made as provided in said Act, the said Counties of Cape Girardeau and Scott should pay to the Cape Girardeau Company the actual cost of the construction of the same.

That the consideration for said agreement was that the Cape Girardeau Company should build the macadamized road across said swamp, as provided in said Act. That, relying upon said Act of the General Assembly, and that its provisions would be upheld and carried out by the State of Missouri and the Counties of Cape Girardeau and Scott, the Cape Girardeau Company built said macadamized road across the Big Swamp in the years 1853, 1854 and 1855, in accordance with the provisions of said Act, and further, in the year 1873, extended its road to Cape Girardeau (from

B to C). That the original cost of said road was $30,000. That in 1885 the Cape Girardeau Company urged said counties to purchase the road, but they refused to do so.

Defendant further avers that it acquired said road from its grantor by issuing to the stockholders of the grantor (the Cape Girardeau Company) $15,000 of its paid-up capital stock.

V. Defendant says that the proceedings of plaintiff under this petition violates Sections 4, 15, 21, 30 and 31 of Article II of the Constitution of Missouri; also Section 9, paragraph 3, and Section 10 of Article I; Section 4 of Article IV; and the Fifth and Fourteenth Amendments of the Constitution of the United States, all of which are pleaded in bar to this proceeding.

REPLY. The reply first denies the allegations of new matter.

It denies that the defendant is authorized and empowered by its charter to own the turnpike between Cape Girardeau and Scott Counties, but only authorized to construct and build a new road. Denies that the road across the Big Swamp was located and constructed in the years 1853, 1854 and 1855 by the Cape Girardeau Company over the property then owned by Brown, Simeon English and others and the United States, but charges that said road was built through said swamp upon a public county road from Benton, the county seat of Scott County, to Jackson, the county seat of Cape Girardeau County, and known variously as the "Jackson and Benton Road," "The Benton and Jackson Road," "The Levee Road," "The Big Swamp Road," and the "Road through the Big Swamp." It was approximately three miles long and had been maintained under the supervision of the counties of Scott and Cape Girardeau for many years prior to 1853. Denies that the Cape Girar-

deau Company cleared a 60-foot right-of-way, threw up embankments and ditched said roads. Alleges that the clearing, leveeing and ditching had been done by the public authorities, prior to the company's incorporation, and that the only work done by the Cape Girardeau Company was to macadamize the road across the Big Swamp.

The relator admits that the company acquired the road along the north side of said swamp (from A to B) by condemnation, donation and purchase, and constructed a macadamized road thereon from the north end of the levee to the south end of Sprigg Street in Cape Girardeau. But denies that in 1853, 1854 and 1855 the main thoroughfare from Benton to Cape Girardeau was at a point other than that over which said levee had been constructed (from B to C).

It denies that these proceedings are in conflict with the State and Federal Constitutions.

It denies that defendant herein has any paid-up capital stock, but charges that the macadamized road was built by the Cape Girardeau Company under the Act of February 24th, 1853, and that the company's right to take tolls thereunder expired February 24th, 1903, and the road then became a free public highway, and that defendant, Scott County Company, had no authority to acquire said road, or the fee simple title to the same. That the directors of the Cape Girardeau Company made a pretended conveyance to the defendant, in order to continue the taking of tolls, but had no right so to do.

That defendant has no assets. That no money was paid in on its capital stock, and that it wrongfully and unlawfully claims to take tolls; that by opening said road to the public the same was dedicated as a public highway, and that upon the expiration of said Charter, February 24th, 1903, the same became a free public highway.

JUDGMENT.

"Now, at this time, this cause having been heretofore tried and submitted to the court and by it taken under advisement until this time, and the court, having fully considered all the questions involved, finds the issues for the Relator; and that Respondent is wrongly operating and collecting tolls on a road being a free public highway, beginning at the intersection of Good Hope and Spring Streets, in the city of Cape Girardeau in said county, a public highway known as the Scott County Road, and sometimes as the Rock Levee Road, runs in a southwesterly direction along the eastern side of the bluffs, thence southwesterly over and across what is known as the Rock Levee, crossing the swamp to the bluffs in Scott County, near Cape Girardeau County line, as described in Relator's petition.

"It is therefore considered, ordered and decreed that the Respondent, the Scott County Macadamized Road Company, has no legal authority to operate the highway above described as a turnpike or toll-road; that the said road is now a free public highway; and it is further ordered that the Respondent, its officers, agents, successors and assigns, be restrained from further maintaining gates thereon, from collecting toll from travelers thereon, and from in any way interfering with the public in the free use of said highway."

THE EVIDENCE.

Title to the Part of the Road between A and B.

There is no dispute about the fact that the portion of the road between Cape Girardeau and the north end of the swamp road—A to B—was acquired by the Cape Girardeau Company by deed or condemnation, the green part, which should extend to the town, being that acquired by condemnation, the rest by deed. Nor is there any dispute about the

fact that it was a new route, no road, public or private, existing there before the company built the toll-road in 1872 and 1873, in pursuance of the authority in the second section of its charter, which provides that it may build across the swamp "with the privilege of extending the same to Cape Girardeau." The foregoing is admitted in the plaintiff's reply (R., p. 13).

Much evidence was offered on the point of whether the toll-road across the swamp, from B to C, was built on what was theretofore a public road.

Plaintiff offered first the charter of the Cape Girardeau Company (R., p. 15), then nineteen orders of the Cape Girardeau and Scott County Courts (R., pp. 16-24). The orders may be divided into two classes: A. Those appropriating money for repairs and bridges; and, B, those appointing road overseers. The latter would seem to have no significance, as of course a road overseer could report to the county court the condition of a toll-road, or even private way, as well as a public road.

The orders of May 17, 1848; September 13, 1849; December 15, 1849; June 10, 1850; June 11, 1850; October 7, 1850; May 30, 1851; September 9, 1853; April 29, 1856; August 9, 1863, and April 20, 1857, all relate to parts of roads not involved in this litigation, or are mere appointments of road overseers, and in a few instances include the swamp road, which constituted a link in the road between Benton and Jackson.

The orders of November 20th, 1847; May 22, 1851, and December 11, 1853, are for work "to be done on the road across the Big Swamp," and would therefore apply equally to the dotted road along the Mississippi River, marked "To Commerce and New Madrid," as well as to the toll-road across the swamp. The dotted road along the Mississippi River was a regularly opened public county road. There

were four orders that would seem to relate to the toll-road from B to C, one of September 2, 1850, appropriating $50 for repairing "the road across the Big Swamp on the road leading from Benton to Jackson" and appointing a superintendent. Also one of May 21, 1851, appropriating $200 for the same purpose; but this order was repealed by one of May 22, 1851. The order of November 29, 1853, allowed a commissioner $43 for superintending "the repairs of the levee across the Big Swamp on the road from Jackson to Benton." Not "road," but "levee!"

JESSE J. MILLER (R., p. 24), 69 years old; JAMES F. ALLEN (R., p. 30), 67 years old, and SIMEON R. JONES, 65 years old, testified on behalf of the plaintiff that they had known an old corduroy road running substantially on the same route as the toll-road, across Big Swamp, from B to C, as early as 1840, 1850 and 1855, respectively. That the ground was wet, such as is usual in swamps; that the road was thrown up about 6 inches and was a corduroy road. That it was impassable at times; that it was in part grown up with underbrush at times; that it was repaired at times, but they didn't know by whom. That the present rock road was about 18 inches high. Miller was 5 years old when he first saw it; Allen, 13, and Jones saw it before the toll-gate was put on it (1856). He was then 7 years old. Jones testified that the old corduroy road deviated from the toll-road both at the north and south ends in the Big Swamp (R., p. 23), and again that he would not say there was no deviation at the north end, but there was a deviation to the west at the south end. He also testified to the road along the Scott County bluff, crossing Cape LaCroix Creek, but didn't know whether it was a public road. He said he had not been familiar with the roads since 1862 (R., p. 34).

The plaintiff did not attempt to show that any of the

steps required by law for the establishment of a public county road had been taken to constitute the road a public county road, nor did it show that it was a public State road. The above merely shows that the public used a road on that route and no effort was made to show who constructed it or whether it was a private road merely used by the public. As before stated, the above is all the evidence introduced by plaintiff to establish the character of it before it was converted into a toll-road, which was done in the years 1853, 1854 and 1855.

DEFENDANT'S EVIDENCE.

FRISSELL testified that he had been county surveyor, that the plats offered in evidence at pages 42 and 94 of the record are correct. That the boundary line between Scott and Cape Girardeau Counties was the quarter section line running through Section 25, Twp. 30, R. 13. That that part of the road across the Big Swamp lying in Scott County is about one mile in length.

Patent from State of Missouri to Cape Girardeau Company under the Act of March 10, 1869, conveying to the county the swamp lands conveyed to Missouri by the United States on September 28, 1850, which included T. 30 N., R. 13 E.; S. E. 1/4 Sec. 24; N. 1/2 Sec. 25.

Patent from Missouri to Scott County, similar to above, dated April 29, 1870, conveying T. 30 N., R. 13 E.; S. 1/2 Sec. 25; T. 30 N., R. 14 E.; W. 1/2 N. E. 1/4, S. E. 1/4 of the N. E. 1/4 and W. 1/2 of the S. E. 1/4 of Sec. 30.

The part of the swamp road contained in these two patents appears in black on the plat bound with this brief.

Deed dated May 27, 1903, from the trustees, former directors, of the Cape Girardeau Company to the Scott

County Company, conveying the whole of the road in litigation (R., p. 48).

Consolidation of the Cape Girardeau and Scott County Companies on May 27, 1903 (R., p. 50). It was contended below that the old corporation had a perpetual charter, but that point will not be presented here.

Condemnation proceedings terminating in 1875, showing the acquisition by the Cape Girardeau Company of a 60-ft. right-of-way through Out Lot 63 of Survey No. 2199 (R., pp. 52-55). Shown in *green* between letters A and B; the green should extend to Cape Girardeau.

Deeds from Houck and various other parties to the right-of-way of the whole of the rest of the road from A to B, and B to C. All executed and delivered in June or July of 1903 to the Cape Girardeau Company or Scott County Company or both of them (R., pp. 55 to 59).

R. G. RANNEY (R., p. 59), one of the attorneys in this case, testified he had known the swamp road since 1854, and they were then "rocking it." He didn't know who "rocked it."

(R., p. 73.) I am a lawyer by profession, and searched the records of Scott County and Cape Girardeau County and found no order showing the consent by the County Court of either county to take possession of and occupy any road running across Big Swamp. I made a thorough examination of the records of both counties, page by page, up to the time of the organization of our company. I carried my search up as late as 1856. I had the clerks of each county search for a petition for a county road or an application, and neither of them could find any. Mr. Giboney was my great-uncle and an owner of this road, with which I have been familiar all my life.

LOUIS HOUCK (R., p. 60), testified he had known the road since 1869. I got control of this road in 1869. I might say I constructed it (from A to B). About two-thirds of the work was done. I finished it in 1873 to Cape LaCroix Creek. I put a bridge across it. Constructed it to Sprigg Street. There was no road prior to the time I constructed it from the north end of the swamp road (from A to B). Before I constructed it there was a road that went along the top of the ridge, and descended from the hill and struck the rock levee. Not one inch of the road I built (from A to B), was located on the old public road. I acquired the right-of-way by condemnation and deed to our company. The total cost of building the road from Cape Girardeau to the levee was $12,000. I don't know what the road across the swamp originally cost, but it could not be constructed for less than $10,000 now. It is entirely a macadamized road with 12 to 15 inches of broken stone, with no heavy rock, on an average of from 15 to 16 feet wide. The soil is gumbo. It is waxy, very hard when dry, and when soft, like soap. It is hard to handle.

For the first five or six years after 1873, when I got possession of the road, the stockholders got nothing out of it. Income was all used for repairs. The capital stock was $15,000. The total cost of constructing the road was not less than $25,000. We have collected 4% per year for the last twelve years, on the capital stock. The capital invested in the road has never paid ordinary interest. In the last ten years the Mississippi River has overflowed it twice and prior to that time we had two overflows in succession. When the overflow goes over the road it takes off the fine material and carries it down into the ditches.

JESSE J. MILLER (R., p. 94). Witness identified the map at page 94 as correctly showing the private and public roads at the time he was appointed road overseer,

except that the public road from Cape Girardeau to the letter B was not then built. The only road worked as a public road at that time was the Cape Girardeau and Bloomfield Road and the Jackson Road running north from point B on the plat. The road running down on the north side of Cape LaCroix Creek was not a public road. Cross and Ellis had farms down there and generally kept it open. It was traveled by the public, by the neighbors, and also by people going from Scott County to Cape Girardeau. They just hunted out a road anywhere they could find it. That is the truth about it. It was not worked by the public. I never saw anybody at work on the road from B to Dr. Brown's farm. (We are using the lettering on the plat in this brief, instead of the letter on map at page 94 of the record.) When I was overseer I worked it up to point B and then stopped. Never had any orders to work it. When I was road overseer I lived on what is now called the Gordonville road, three miles west of Cape Girardeau, about half way between the Gordonville Road and the Bloomfield Gravel Road. When I first knew these roads I lived at the Peter Byrns farm, where I was born. I was familiar with all these roads. When I was a boy at the Peter Byrns farm, I used to go to Sim English's place. I would go over these grounds of a Sunday with the boys, playing, and besides, I went with my father over that ground time and again hunting stock. To the best of my recollection there was not a sign of a road where the toll-road runs now from A to B. To my recollection there was no road there before the toll-road was built. When I first knew the levee I worked the Benton part of it to the levee, and sometimes from it, but never was ordered to work that as a public road. The levee road through the swamp had been laid with poles when I first knew it, and the poles about 1/3 or 1/4 were worn out, and the ground was very soft underneath them, and when a horse stepped on one of them the

mud and water would squirt up high. My recollection is that after I was about grown I could ride in the middle of the toll-road and touch the bushes on both sides. I don't know about its being cut out 60 feet and the brush growing up afterwards. The road was flat. There had been ditches there, but they were filled up. They called it the pole-road. It might have been called the levee road. Most everybody talked about the pole-road. I believe it was called the road across the swamp, and also the Big Swamp Road. It was a part of the direct road from Benton to Jackson. Jackson is the county seat of this county and Benton of Scott. There was a culvert in the middle of it. I don't remember any bridge. I have traveled that road since I was four or five years old. I had a brother living on the south of the swamp. I rode behind my father and behind him. We used the by-paths and would come back to the road. The opening was straight. There was no other way for people going between Benton and Jackson but this levee road, unless they went off in the swamp. It was almost impassable in winter. You could go anywhere in the summer when it got dry. You could go over this road if you knew it, but you could go much easier anywhere else than on the road. That opening was there and the poles on it when I was a boy. When I was road overseer I cut out a part of a road east of Cape LaCroix Creek and worked it as far as it was cut out. It didn't go to the Scott County line. It didn't go a half mile from where the present bridge is on the creek now, the gravel road. These other roads across the swamp, the one down the river and the one across the college farms, are also called roads across the swamp. The people down there on the east side of Scott County all traveled that road along the river. It was known as the road across the swamp. There was another road across the swamp, so called, which ran by the college farm. There was a way to cross there, you could go through and come

out near the rock levee, if the slough was not too high. The road going from the rock levee to Jackson was called the Jackson or Benton Road, according as one was going. I think it was so called before 1850. At the other end of it, from the north end of the levee on towards Benton was also called by the same name.

JOSEPH H. MOORE (R., p. 78), 67 years of age; hauled wheat across the Big Swamp in 1848 to his father's farm. There was a road across Cape LaCroix Creek where it went into the Mississippi River. He then testified in substance to similar facts to those testified to by Jesse J. Miller.

L. B. MEYERS (R., p. 75), 78 years old, carried the mail from Benton to Cape Girardeau and Jackson, from the time he was 9 until 13 years of age. He, in substance, testified to the same facts as Miller.

EMILINE BROWN (R., p. 83): I knew about the Rock Levee Road before the war. I lived there. There was a road leading from in front of Dr. Brown's residence (near letter C), we called a hog-path, across the swamp. Dr. Brown built a road after he moved there. He and Uncle Josh and John and Uncle Frank Ancill. They dug the road and hired oxen and hauled these ties like on the railroad, they laid them there and ditched the road, cut out all this little growth to make that road. Those men worked there, I don't know how long. Miss Amanda Brown and I used to run up and down those trenches. Before that they had but a small path across the swamp. When it rained we could not get across. There was very little travel across. Dr. Brown cut the road straight to the hills two miles and laid those "puncheons" (split logs). Before that there was nothing but what we called hog-paths. Be-

fore that there was nothing but an embankment, nothing but a sea of water. In dry weather wagons could pass because they could drive off, but in wet weather they couldn't, because they couldn't pass on the road. That was Dr. Brown's private road. He built it for himself. There were no strangers worked on the road while we lived there. He built the road with his own men and Mr. Ancill's. His people and Mr. Ancill's were about the only ones that traveled the road at that time. I don't know exactly how old I was. "I was older than Miss Althea was." I don't know how long it was before the war, but it was long before the war. We were just little bits of tads then.

Cross-Examination. I was not born on Dr. Brown's place, but on Robert Giboney's place. I don't know how old I was when the war began. I was married during the war. Dr. Brown helped people out with his ox-teams, both before and after the road was fixed. Some few people besides Dr. Brown and Mr. Ancill used the road, some few from Scott County. The swamp was covered with large trees, and small ones too—heavy timber. Dr. Brown had to cut this road through the timber, there was none there. Before he made the road people could go across for two miles. Some time before that the trees had been cut down along that path. I don't know who cut them down, but I guess Master had it done. I recollect there was a passage across the swamp at that place, and used occasionally by people going across with wagons and horses. Dr. Brown dug the ditches and cut the timber for people to come across the swamp, and the road which Dr. Brown built by ditching and laying logs was built along the line of the old hog path right in the middle. At that part of the swamp underbrush and young trees grew up very quickly, and if the clearing was neglected for a few years it quickly became covered. The hog path was "not much wide" before Dr.

Brown cut it out, but wide enough for a wagon to pass. It was not wide enough for two wagons to pass at any point.

Defendant offered certain orders of the Cape Girardeau and Scott County Courts beginning at record page 67. One of May 22, 1855, relating to a ditch through the swamp "at or near the Cape Girardeau and Scott County macadamized road" and another of October 27, 1856, appointing an overseer for a part of the road "extending to the toll-gate at the macadamized levee on the Big Swamp."

These orders show that the road had been macadamized as early as May 22, 1855, two years after the grant of the charter.

The orders of June 9, 1846, and May 11, 1848, show the proceedings to establish the road along the dotted line to Commerce and New Madrid by way of the mouth of Cape LaCroix Creek. There is also another order of August 8, 1835, for a similar purpose. The rest of the orders, 13 or 14 in number, relate to the appointment of overseers or the making of appropriations for improvements on the road to Commerce and New Madrid, dotted along the Mississippi on the plat as aforesaid.

The purpose of these orders was to show that the county had established a public road across Big Swamp and that many of the orders introduced by the plaintiff related to that road and not to the toll-road.

On February 27th, 1851, just two years prior to the passage of the Act creating the Cape Girardeau Company, the State adopted a general act for the creation of, and plan for the operation of, macadamized roads, Session Laws of Missouri, 1850-51, p. 159.

Under that Act persons could create a corporation by simply signing Articles of Association, as provided in the Act, setting out the route, the capital stock and such other

matters as are generally required by statutes of that nature. The life of a corporation could not exceed thirty years, and the county court was given power in Section 6 to locate the toll-road over any existing county road or highway, and thereupon such road became "the property of said county, for the purpose of making and maintaining said road, and the gates and toll-houses thereon." That said companies were given the right of eminent domain and the tolls were fixed at 1/2c per mile for one-horse vehicles, 1c for each additional animal, etc. It provided for the exemptions, such as funerals, religious meetings, etc., and made it a misdemeanor for other persons to go over the road without paying toll, and in general regulated fully the business of its company and of its agents. The Act contained, all told, 38 sections, and is an elaborate scheme for building and operating toll-roads in the State.

This case, The State *ex rel.* Hines v. Scott County Macadamized Road Co., is reported in the 207 Mo. 54.

THE PLAT.

The plat bound in this brief is a composite one, made of those at pages 43 and 94 of the record. We have added certain things we thought might aid the court in arriving at the facts, as follows:

1. The part of the road between B and C colored black is that conveyed in the patents offered by the defendant, the title to which was conveyed by the United States Government in the well-known Swamp Land Act in 1850 to the State of Missouri, and by the State to Cape Girardeau and Scott Counties in 1869 and 1870, respectively.

2. The part colored green between A and B is that acquired by the Cape Girardeau Company by condemnation.

(The green should extend to the city limits of Cape Girardeau.)

3. The lines designating the Swamp and the Scott County Hills have also been added from the evidence.

4. The course of Cape LaCroix Creek, showing its mouth, and that it is the division line between the counties, has also been added.

5. Also the county line division running through townships 25 and 30.

We have made up this plat, hoping that it might aid the Court. In this form it was not in evidence in the case.

ERRORS.

Of the twenty-eight errors assigned, the following are material and are those we wish to present here:

"IV. The Court erred in holding that the Cape Girardeau & Scott County Macadamized Road Company had no property rights in its right-of-way which it could devolve upon defendant." (R., p. 136.)

"VI. The Court erred in holding that the road-bed, bridges and superstructure of broken stone, constructed by the Cape Girardeau and Scott County Macadamized Road Company, is now the property of the public." (R., p. 137.)

"XVIII. The Court erred in failing to ascertain and declare what the intentions of the contracting parties to said charter were, as ascertained from the language of the charter and the surrounding facts and circumstances attending the building of the road." (R., p. 137.)

"XIX. The Court erred by its judgment and decree in depriving defendant of its vested rights, and which judg-

ment and decree is in violation of Section 10, Article I, of the Constitution of the United States." (R., p. 137.)

"XXI. The Court's judgment and decree is in violation of the amendments to the Constitution of the United States in this, that it provides for depriving defendant of its property without due process of law." (R., p. 138.)

"XXIV. The Court erred in holding that said act is not in violation of Section 10, Article I, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts." (R., p. 138.)

POINTS.

I.

A franchise or charter granted by a State to a quasi-public corporation is a contract the obligation of which cannot be impaired.

The St. Clair County Turnpike Co. v. People of the State of Ill., 96 U. S. 63, 24 L. E. 651;
New Orleans Gas Light Co. v. Louisiana, L., H., P. & Mfg. Co., 115 U. S. 560, 29 L. E. 516;
New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. E. 525;
Pearsall v. Great Northern R. Co., 161 U. S. 1. c. 663, 40 L. E. 844.

II.

The decision of a State court, holding as a matter of construction, that a particular charter or charter provision does not constitute a contract, is not binding on this court.

Mobile & O. R. R. Co. v. State of Tenn., 153 U. S. 486.

III.

Where the judgment of the highest court of a State gives effect to a State law, which is claimed by the unsuccessful party to impair the contract set out and relied upon, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation.

Mobile & O. R. R. Co. v. State of Tenn., *Ib.*

IV.

Due process of law requires compensation to be made, or secured, to the owner of private property when it is taken by a State or under its authority for public use.

C., N. O. & T. P. R. Co. v. Ky., 115 U. S. 321, 29 L. E. 414;
C., B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. E. 979;
Norwood v. Baker, 172 U. S. 269, 43 L. E. 443.

V.

A judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the Fourteenth Amendment of the U. S. Constitution.

C., B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979;
Tindal v. Wesley, 167 U. S. l. c. 222; 42 L. E. 143;
Smyth v. Ames, 169 U. S. l. c. 526; 42 L. E. 842.

VI.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process, as well as a denial of the equal protection of the laws.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560;
Smyth v. Ames, 169 U. S. 466; 42 L. E. 819;
People v. Roberts, 171 U. S. 658-683;
Ry. Co. v. Ellis, 165 U. S. 150;

U. S. v. Express Co., 164 U. S. 686;
Ry. v. Beckwith, 129 U. S. 268;
Gloucester Ferry Co. v. Penna., 114 U. S. 196;
Cooper, etc., Co. v. Ferguson, 113 U. S. 727.

VII.

If an instrument is subject to two constructions, the rule that that most favorable to the public would be adopted will not apply, if its application would obviously defeat the legislative intent. *A fortiori* the rule has no application where the meaning of the grant is clear and free from ambiguity.

Moran v. Miami Co., 67 U. S. 722 (17 Law. Ed. 344);
St. Clair County Turnpike Co. v. People, *supra.*

ARGUMENT.

In 1851 there was in force in Missouri a general law under which toll-road companies might be organized. In 38 sections it provided an elaborate system for the construction and operation of pike roads, including the tolls to be charged, etc., etc. This Act was passed in February of 1851, and has, with certain changes, made from time to time, continued to be the law of this State down to the present time. Sess. Laws, 1851, p. 260.

This general law had been in full force for two years when the special charter of the Cape Girardeau Company was granted by the Legislature, on February 24, 1853. The second and eighth sections of that charter are as follows:

> "2. The said company shall have the exclusive privilege of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, and running across said swamp a distance of 3 or 4 miles, with the privilege of extending the same to the City of Cape Girardeau; said road to be located on what is called the levee or between the levee and the Mississippi River."
>
> "8. The privileges granted in this charter shall continue for fifty years; Provided, that the county courts of the counties of Cape Girardeau and Scott may at the expiration of 20 years or any time thereafter, purchase said road at the actual cost of construction, and make it a free road."

Section 7 fixed the toll-rates, which are higher than those in the general act.

On April 3, 1901, the Legislature passed the Act providing that where toll-road charters had expired by limitation

or otherwise, but the roads continued in the possession of the corporation, the prosecuting attorneys should file suits to enjoin the companies from collecting tolls.

It was under this latter Act that the relator, Hon. T. D. Hines, instituted this proceeding, which resulted in a judgment enjoining the Scott County Macadamized Road Company, the plaintiff in error, from continuing to collect tolls on the road in controversy.

The Scott County Company was organized under the general toll-road act, with a capital stock of $15,000, which it turned over to the trustees of the old Cape Girardeau Company in consideration of the conveyance of all of the property of that company to the Scott County Company.

Under the Missouri law, such property as the Cape Girardeau Company owned passed to the last board of directors, as trustees, if the charter did in fact expire in 1903. Those persons conveyed all of the toll-houses and other property, including the toll-road, to the Scott County Company. Therefore, whatever property the Cape Girardeau Company had in the toll-road passed to the Scott County Company. As the counties denied that the Cape Girardeau Company had any interest in the toll-road and that company contended that its charter had not expired, to cover another contingency it consolidated with the Scott County Company. The Circuit Court held that the Scott County Company took nothing by the consolidation or conveyance, which judgment was affirmed by the Supreme Court, the latter holding that the Cape Girardeau Company, after the lapse of fifty years, had no property in the road, and therefore neither the consolidation nor conveyance could vest the Scott County Company with any interest in the roadbed.

The only parts of the decision material to the two points we wish to present here are found in paragraph 4, on record page 129. The Court says:

"To rid this question of all confusion, it may be well to remark that by this proceeding the State does not claim or seek to recover by this action the toll-houses, gates or other personal property of the appellant, but seeks only to restrain and prohibit the defendant from any longer obstructing this road, which the State insists became on the 24th of February, 1903, a free public highway, disburdened of the public and continuing nuisance of toll-gates across the same and the exaction of illegal tolls by the defendant, its agents, servants and employes. And thus we are brought to the real contention in this case, to-wit, what was the character of the rights acquired by the Cape Girardeau and Scott County Macadamized Road Company under its charter of 1853. By reference to the Act itself it will be seen that this corporation was created for a public purpose, to-wit, that of constructing a macadamized road across the Big Swamp in the counties of Cape Girardeau and Scott, with the privilege of extending the same to the city of Cape Girardeau, with the privilege of taking tolls from all persons who should travel thereon, and to enforce the collection of the same by erecting gates or turnpikes to obstruct the passage over said road until the tolls fixed by the Act were paid. And the right to exercise this privilege was expressly limited to fifty years. No power was granted to said corporation to obtain a fee simple title to the land over which said road should be constructed. The only right granted to it was to obtain an easement or right-of-way for its said proposed road."

The Court then proceeds to examine the nature of the title of toll-roads in the roadbed and arrives at the conclusion that it is an easement which terminates with the charter of the company, and that such roads continue to be public highways, disburdened of the right of the corporation to take tolls. It then concludes, at page 133:

"And by such conclusion * * * no property right of the company is taken for which it is entitled to com-

pensation. In view of the well-settled law on this subject, it must be held that the contract of the State with the Cape Girardeau and Scott County Macadamized Road Co. terminated on February 24, 1903, and the road constructed by it on that day ceased to be a toll-road, but its character as a public highway remained and the public is now entitled and was on that day entitled to its free use, without the payment of tolls. It follows as a corollary, that on May 27, 1903, the said Cape Girardeau and Scott County Macadamized Road Co. had no right, title or interest in said public highway, other than its toll-gates, houses and personal property, which it could convey to the present defendant, the Scott County Macadamized Road Company, and nothing passed by the attempted transfer between the said companies."

In spite of the fact that we set up in our Answer that under our particular charter the road in question could not be taken by the public without paying the first cost, and that the two counties had refused to buy it, and that we urged it at the bar and in our briefs, the Court rules that against us, without discussing it, by holding that at the lapse of 50 years, our charter expired, and in consequence we ceased to have any interest in the road, and that under the Act of April 3rd, 1901, we were rightfully ousted, all because that is the rule with regard to turnpike companies organized under the general act.

The Court ignored Section 8 of our charter * * * "That the county courts of the counties of Cape Girardeau and Scott may at the expiration of 20 years, or any time thereafter, purchase said road at the actual cost of construction and make it a free road."

We contend, first, that the Act of the Legislature of April 3, 1901, and these proceedings in pursuance thereof, impaired the obligation of the above contract; and second, that

this proceeding deprived us of property without due process of law, in that our roadbed was taken without compensation.

Section 8 is the clause in controversy. That provides first, that "The privileges granted in this charter shall continue for fifty years." We take it that simply means the life of the company as a corporation terminates. We do not urge the question of the perpetuity of our charter here, because we think we are concluded by the decision of the Missouri Supreme Court on that point, so far as this case is concerned. Second, that the right terminates to take the higher tolls than those allowed toll companies organized under the general act; and third, that the exclusive right of maintaining a toll-road across Big Swamp comes to an end. This last privilege is carrying coals to Newcastle, as a large sop had to be held out to get one company to build across the swamp, and there was small danger of two.

The rest of clause 8 is: "Provided, that the county courts of the counties of Cape Girardeau and Scott may at the expiration of 20 years, or at any time thereafter, purchase said road at the actual cost of construction and make it a free road." The effect of our Supreme Court decision is to give to the above paragraph, which is perfectly clear and simple, not a construction, but to make an interpolation that such purchase had to be prior to the expiration of the 50 years.

This was not a privilege granted the corporation, but one granted the two counties, therefore not one of our privileges that terminated in 50 years.

If a sentence is clear and the words have no technical meaning, they are to be taken in their ordinary sense and require no more construction when considered in court than when considered elsewhere. We beg leave, however, to recall to the attention of the Court the following propositions which bear on the proper interpretation of our charter:

First. The question of the existence or non-existence of a contract, or, the question of whether a law impairs the obligation of any of the terms of a contract, are questions which this court will determine for itself, where the court of last resort of the State has ruled against the complaining party. Mobile & O. R. R. Co. v. State of Tennessee, 153 U. S. l. c. 492 (38 Law Ed. 793). Second. In construing statutes we should recur to the history and situation of affairs at the time of their passage, in order to ascertain their reason, as well as their meaning. *Ib.*, l. c. 502 (Law Ed. 799). Third. While it is true that if a statute is capable of two meanings, that more favorable to the public is adopted, there is this qualification, that in applying that principle of construction it must be done with regard to the subject-matter contemplated by the Legislature as a whole, so as not to allow its manifest purpose and design to be defeated; and of course where there is no ambiguity and only one meaning attaches to the words, the rule can have no application. Moran v. Miami Co., 67 U. S. 722 (17 Law Ed. 344). Bearing these well-settled rules in mind: Has not the state impaired the obligation of our contract, which was to give us this road until the two counties paid us back its first cost? And has it not through the Act of April 1, 1901, and this proceeding in pursuance of that Act, taken our roadbed without compensation, in violation of the Fourteenth Amendment?

It is agreed that the Cape Girardeau Company acquired whatever interest it had in the road between Cape Girardeau and letter B, by deed and the exercise of the right of eminent domain, and that there was no public road along that route until the Cape Girardeau Company built the toll-road.

Practically all the evidence offered relates to the title to the toll-road across the Big Swamp, from B to C.

Plaintiff made no effort to show that this part of the road had been opened by petition and commissioners, as provided by law. He did show that there was a corduroy road along this route before the toll-road was built, some witnesses stating that the route diverged and some that it was the same. That some earth had been thrown up and, judging from its name, rather than the testimony, it was primarily intended as a levee, and that poles or split logs, called in the vernacular of that region "puncheons," were put on the top of the levee, which was only about six inches high. That certain of these rotted, and it made a road which one could get over, but was avoided except in the season when the swamp was wet, as it was rough and next to impassable. Some of the witnesses said the underbrush grew up on the right-of-way, and in places one riding on horseback could touch it on both sides. The weight of the evidence was that it was an old road at the time the company "rocked" it, and that some of the public used it.

Emiline Brown, a former slave of Dr. Brown, who lived at the south end of the levee, was the only person that testified about the making of this corduroy road. The others all state that it was an old road when they first knew it. She didn't know her age, but was married during the war, and said she well remembered when, as a child, Dr. Brown cut out the right-of-way, and with his darkies made the corduroy road. She could come no nearer fixing dates than that she and Dr. Brown's daughter were children, and were permitted from time to time to go down, while the work was going on, and play on the right-of-way and in the ditches.

The whole purpose, on the part of the plaintiff, was to show that the road was a public one at the time it was macadamized by the toll company in order to bring it within the facts of the Ralls Co. case, 138 Mo. 332. We think

this an immaterial fact. Nevertheless, the only evidence the plaintiff could get was that the road was traveled by the public, and that the county court made one or two orders relating to it. But that it could not have been a legally established public road is conclusively shown by the fact that the part colored black was land owned by the United States Government up to 1850, and at that time, by the well-known Swamp Act, conveyed to the State of Missouri, which retained the title until 1869 and 1870, at which time they were by the State patented to Cape Girardeau and Scott Counties, respectively. The defendant showed that the county records of both counties had been searched down to 1857, and no proceedings had been found creating a public road. That it was macadamized prior to 1856 is conclusively shown by the orders of the county court (which defendant read in evidence) which refer to it as the Macadamized Road, and this is confirmed by one or two of the witnesses and not contradicted by anybody. So it is apparent that from B to C there was a corduroy road, which was macadamized during the years 1853, '54 and '55, by the toll-road company, but it was not a formally established public highway. The part from A to B the toll-road was acquired by purchase in 1872 and '73, as aforesaid, consequently its facts are not those of the Ralls County case.

The main differences between the charter of the Cape Girardeau Company and one which might have been organized under the general Act of 1851 were that the life of the Cape Girardeau Company was 20 years longer, its tolls higher, it had the exclusive right across Big Swamp and its roadbed could not be taken by the public without the repayment by the two counties of "the actual cost of construction."

The Supreme Court, following the Circuit Court, held that at the expiration of 50 years from the date of our

charter our company had property left in the roadbed, which its trustees could convey to the Scott County Company. We contend that our interest in the roadbed, whether a fee simple, an easement, or a license, existed to the extent of the cost of making said roadbed, and that not within 50 or 500 years could the counties take this from us without paying the cost, which was something in excess of $25,000.

The whole decision of this case in the Supreme Court proceeds on the theory that we have a charter under the general act. There is ample authority for the court's conclusion that the ordinary toll-road company loses its interest in the roadbed at the termination of its charter, but we respectfully insist that it erred when it applied this rule to our charter. The Court, after arriving at that conclusion, without referring to the fact that the language of our charter is radically different, simply asserts that we had nothing to sell, ignoring paragraph 8 of our charter, which provides that the privileges granted in the charter should continue for 50 years, "provided that the county courts of the counties of Cape Girardeau and Scott may at the expiration of 20 years *or at any time thereafter purchase the road at the actual cost of construction and make it a free road.*" The effect of the court's conclusion is not to construe clause 8, but to rewrite it by inserting in it the phrase "prior to the expiration of the charter." There is nothing in clause 8 that limits the time of purchase to the charter life, and the Court had no right to insert it. The counties are given the right to buy the road 30 years before the expiration of the charter and "thereafter;" the language is perfectly simple, and needs no interpretation, that to make it a free road they could buy "at the expiration of 20 years or any time thereafter," and "thereafter" means for all time. There is no period put to the time after twenty years by the charter,

and the Court had no right to put it there. This was not a "privilege" expiring in 50 years. This was a right given the counties.

There must have been some reason for granting this special charter. Only two years before its grant, the general Act had been passed, and the nature of the road to be built under this charter was such that the Legislature deemed it necessary to put it in a class by itself. It gave it the exclusive right for 50 years across the swamp, gave it higher tolls and 20 years more of life than it could have had under the general Act, and then provided that before the public should take it, it should pay the first cost. Time has proved that this view was a sound one. The investors have never gotten back their money, and the fact that the swamp was a difficult place in which to build and maintain a road has shown why they made an exception of this particular toll-road company. Not only have they never gotten back the original cost of the property, but they have not even received a reasonable return on the amount in the way of dividends. The counsel on the other side seem to think that it will be a great hardship on the public if we can perpetuate our right by conveying our interest in the roadbed to a corporation formed under the general Act, and thus, as they put it, go on forever. There are two very simple answers to this unnecessary alarm. The first is that at any time Cape Girardeau and Scott Counties wish the road to become a free public highway they may accomplish it by paying the first cost. The second is that it is precisely the situation with regard to all of the other quasi-public corporations in the State of Missouri, and no one feels that it is an impending catastrophe. Every railroad, telegraph and telephone company in the State of Missouri upon the expiration of its charter, can organize a new company and convey the physical property, including the roadbed and right-of-way to the new company, and yet railroads under

the constitution of this State take only as easement; so may the bridge companies across the Mississippi and Missouri Rivers, which are organized under the Missouri law. So may every public elevator, warehouse or other corporation serving the public, where no special charter or license is essential, as in the case of a street railroad. How the law came to be as it is with regard to toll-roads, we cannot say. The probabilities are that it grew out of the fact that public highways were turned over to toll-road companies for a period of years, and the tolls were regarded as sufficient to keep the road in repair, and yield the parties operating the roads some profit, but certain it is they stand on a radically different footing from any other form of quasi-public corporate property, because in all other cases the physical property continues in the corporation or its trustees at the end of its corporate life.

It is perfectly clear that in granting this charter while the general Act was in force, and only two years after the passage of the general Act, it was the purpose of the Legislature to put this company on the same footing with a railroad or telegraph company. We are mainly alarmed by things with which we are not familiar. The fact that the Missouri Pacific or Burlington Railroads, when their Missouri charters expire, can form a new company and go on operating as before, strikes no one with terror, yet because the ordinary toll-road company, organized under the general Act, loses its physical property at the termination of its charter, one like ours that stands on the same footing as a railroad company is looked on as a self-perpetuating monster that should create alarm in the public mind. Our contention is, and the language seems too clear to us for any interpretation, that this stands in the class with railroads, telegraph and bridge companies, and if the public ever wants this right-of-way as a public highway, disburdened of the right to take tolls, it can acquire it by paying us the first cost, and in no other way.

That being so, it is perfectly immaterial whether we took a fee simple, an easement or a license. We acquired the title by deed and condemnation from A to B; we built part of the road from B to C across public lands and property of private persons who made no objection, indeed, who were the builders of the road. The fact is, the land was so utterly worthless no one paid any attention to the title, but it is certain that no part of this road had been established according to the methods provided by the Missouri Statutes for opening public roads, and the county already had a public road, which was established in the regular legal way along the Mississippi River.

There is nothing unusual in the fact that the Legislature found it necessary to give a special charter in order to induce persons to build this costly road—costly in original construction and unusually costly in maintenance—across a swamp three miles wide. We find identically the same situation across the river, in the State of Illinois, as disclosed by the case of St. Clair County Turnpike Co. v. People, 96 U. S. 63, and that situation was dealt with in the same way. There, as in this case, a special charter was granted the company to cross the swampy land leading into East St. Louis, and in the charter the State reserved the right to purchase the road at the expiration of the charter "by paying to said corporation the original cost of said road." That provided if the State did not buy, the company might continue to collect tolls, but that is an immaterial difference. The company then had additional road, theretofore constructed, granted to it under a subsequent Act, and sought to apply the above right to collect tolls to the added road. The Court held that that could not be done, but they held, too, that, so far as the first part of the road was concerned, the company, by implication only, had the right to continue as a corporate body, "with the special faculty of holding and using the turnpike authorized by the Act until redeemed

by the State." And Justice Bradley, speaking for the court, said that that right existed only by implication, and while he repeated the well-known rule that franchises and special privileges are always to be construed in favor of the public, yet where they are simple in language or a strong construction in favor of the public would defeat the plain legislative intent, such construction will not be made. But in our case no construction is required. The language is as plain as it can be made, that the counties "may at the expiration of 20 years, or any time thereafter, purchase said road at the actual cost of construction and make it a free road."

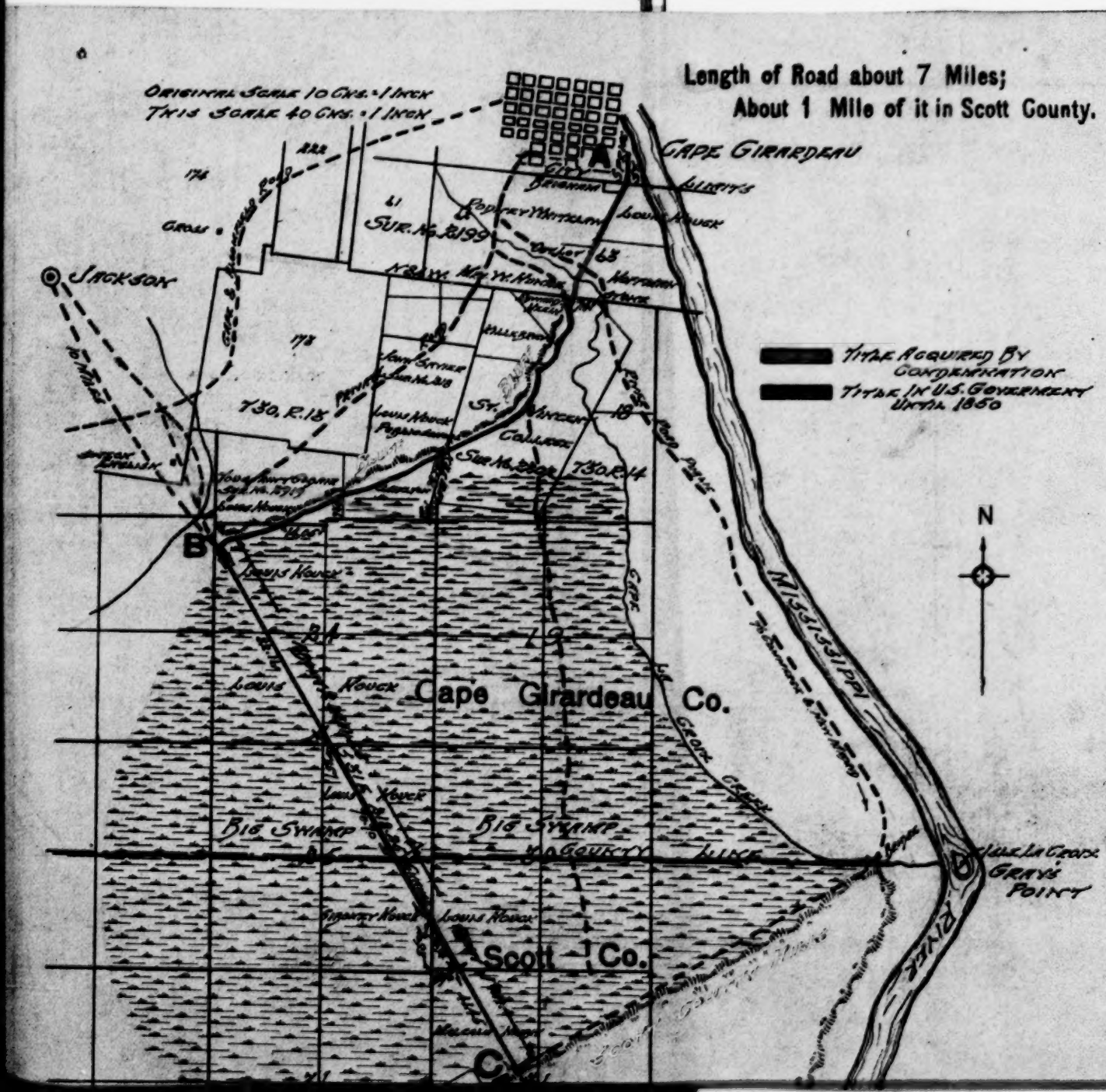
It is immaterial, for the purposes of this question, whether we had an easement, a license or a fee simple title. We owned the macadam on the road, the top dressing, the broken stone in place, if you please. The public had no right to take it without paying for it, and the Court has no right to read into the charter that at any time after 20 years *"and before* 50," the counties would have to pay the first cost.

"At the expiration of 20 years or any time thereafter" means just what it says, that never in the course of time could this become a free road, without returning to the persons who entered this hazardous venture the money which they had invested in it, and up to the present time have not received back, though the thing it created has been confiscated by the State.

Respectfully submitted,

EDWARD S. ROBERT,
Attorney for Plaintiff in Error.

DOUGLAS W. ROBERT,
WILLIAM L. BECKTOLD,
Of Counsel.


Length of Road about 7 Miles;
About 1 Mile of it in Scott County.
ORIGINAL SCALE 10 CHS. = 1 INCH
THIS SCALE 40 CHS. = 1 INCH
CAPE GIRARDEAU
JACKSON
SUR. No. 2199
730, R. 13
730, R. 14
TITLE ACQUIRED BY CONDEMNATION
TITLE IN U.S. GOVERNMENT UNTIL 1850
N
Cape Girardeau Co.
Scott Co.
BIG SWAMP
BIG SWAMP
MISSISSIPPI RIVER
GRAY'S POINT
LOUIS HOUCK

APR 13 1900
JAMES H. MCKENNEY,

No. 52.

Brief for Defendant in Error

IN THE

SUPREME COURT OF THE UNITED STATES.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI, *EX REL* T. D. HINES, PROSECUTING ATTORNEY OF CAPE GIRARDEAU COUNTY.

T. D. HINES, Relator,
Attorney pro se.

M. A. Dempsey,
atty for
Deft in Error

(20,968.)

(20,968.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 565.

SCOTT COUNTY MACADAMIZED ROAD COMPANY, PLAINTIFF IN ERROR.

THE STATE OF MISSOURI, ***EX REL*** T. D. HINES, PROSECUTING ATTORNEY OF CAPE GIRARDEAU COUNTY.

IN ERROR TO SUPREME COURT OF THE STATE OF MISSOURI.

Long beyond the memory of the oldest witnesses who testified in the cause a roadway generally traveled by the public existed across the big swamp, between the towns of Jackson and Cape Girardeau, in Cape Girardeau county, and the town of Benton, in Scott county, the road being variously known and referred to as the Benton and Jackson Road, the Levee Road, the State Road and the Road Across the Big Swamp. The right-of-way was through a virgin forest and was clear-

ed to a width of from forty to sixty feet; ditches were dug, bridges and culverts built, embankments thrown up and poles laid crossways thereon, making the road originally a corduroy road. The witnesses testify that when they first knew it it was an old road and much traveled, one witness stating it to have been more than thirty years old, because all of the stumps of the trees cleared from the right-of-way had disappeared. The road was recognized and treated as a county road in many orders of the County Court, but nevertheless counsel have laid much stress upon the fact that no formal order of the County Court opening the roadway was offered in evidence. From the testimony it is fair to assume that the road existed as such even before the organization of the county, and there was therefore no occasion for any action of the County Court in opening the road. The entire effect of all of counsel's labored effort in this regard is minimized by the very fact that the charter of the original company expressly authorized it to locate its road "on what is called the levee," thus officially recognizing and pointing out as the desired and appropriate route the cleared right of way traveled by the public and known as the levee road. And it did locate its road upon that levee, and it is known as the Rock Levee Road at this day.

The old road in wet weather was bad—almost impassable. The demands of trade required that a road bed of better and more permanent character be built, and accordingly in 1853, a special charter was granted by the Legislature authorizing the creation of the Cape Girardeau and Scott County Macadamized Road Co., for the purpose of constructing a macadamized road across the big swamp, to be located on the levee or between the levee and the Mississippi river. [Trans. 15.] The principal privilege granted was the right to erect

toll gates and collect toll, as set forth in section 7 of the charter. [Trans. 16.] Immediately following section 7 is section 8, which provides in express terms that the privileges granted shall continue for FIFTY YEARS, with the condition, however, that the County Court might, at any time after twenty years, buy the road and make it a free road. The road was built, toll gates were erected and tolls collected from the traveling public. In 1903, the time fixed by the charter when the privileges granted by it were to cease, the corporation instead of abolishing the toll gates and giving to the public free access to the roadway as was manifestly intended by the Legislature, attempted to perpetuate the road as a toll road by procuring the organization of the appellant, the Scott County Macadamized Road Co., and making to it a pretended absolute conveyance of the roadway and all other rights and effects owned or claimed to be owned by the original company, and without any physical change in the character of the roadway, the same persons, under the guise of the new corporation, continue to maintain the old toll gates and collect tolls; and presumably, should they be sustained in their action by the decision in this case, they will continue to organize toll corporations and collect tolls to the end of time. The determination of the only substantial question at issue in the state courts was involved in the construction of the charter. For if the Legislature meant what it said when it stated that the *pricileges* granted by the charter should continue for *fifty years*, then the right to take tolls as one of those privileges ceased; and the corporation most assuredly could not convey to another corporation a right which it did not have. We append as a part of our argument, the careful and studious opinion of Judge Anthony who tried the case. The opinion defines the issues clearly, states the facts establish-

ed by the evidence so far as the court deemed them material to the questions involved, and makes an exhaustive and most thorough analysis of decisions of courts throughout the United States, tending to throw light upon the matters discussed.

We also append for the convenience of this court the very lucid and convincing opinion of Judge Gantt. As to the matters of fact and law passed upon by Judge Anthony and Judge Gantt we do not deem it necessary to burden this court with further argument. We will venture, however, a few remarks touching some features of the case as viewed from the standpoint of a federal court which is asked to annul the adjudication of the State Circuit and Supreme Courts.

BRIEF.

1. The charter of the Scott County Macadamized Road Company expressly provides that the privileges granted by the charter shall continue for fifty years. The company and its franchise to take tolls therefore expired Feb. 24th, 1903.

Session Laws, 1853, pages 337, 338.

Transcript of Record, pages 15, 16.

2. The road bed in question was a public highway established by public authority for public use, and is to be regarded as a public easement and not as private property. The right to travel over the road was an easement vested in the public, and when the charter expired this easement continued, disburdened of tolls, but otherwise unaffected.

State ex rel vs. Hannibal and Ralls Co. G. R. Co., 138 Mo., 332.

Campbell on Highways, No. 8, p. 8; No. 14, p. 11.

Benedict vs. Gait, 3 Barb., 469.

Davis vs. Mayor of New York, 14 N. Y., 516.

St. Clair Co. Turnpike Co. vs. Illinois, 96. U. S., 63, 24 L. Ed., 651.

27 Am. and Eng. Encyc. of Law, 320.

Pittsburg, etc., vs. Com., 104 Pa., 583.

State vs. Lake, 8 Nev., 276.

State vs. Curry 6 Nev., 75.

State vs. Dayton, 10 Nev., 115.

Wood vs. Truke Co., 24 Cal., 474.

Craig vs. People, 47 Ill., 487.

Police vs. Jury, 44 La. A., 137.

Hayward vs. Mayor, 8 Barb., 492.

Hooker vs. Utica, 12 Wend., 371.

State vs. Passiac, 42 N. J. L., 524.

State vs. Mayor, 29 N. J. L., 441.

Jersey City vs. State, 30 N. J. L., 521.

State vs. Atlantic City, 34 N. J. L., 99.

State vs. Leith, 83 Cal., 239.

Dawes vs. Hawkins, 8 C. B. N. S., 857.

State vs. Western, etc., 95 N. Car., 602.

Kansas vs. Lawrence, 22 Kan., 438.

Blood vs Woods, 95 Cal., 78.

People vs. Davidson, 21 Pac. Rep., 538.

State vs. Maine, 27 Conn., 641;
71 Am., Dec., 89.

Central Bridge vs. Lowell 15 Gray, 106.

People vs. Newburg, 86 N. Y., 302.

Heath vs. Barrymore, 50 N. Y., 302.

3. The words "perpetual succession" mean continuous succession during the life of the charter only. Of themselves they do not confer perpetuity upon a corporation. The word "perpetual" qualifies the succession and not the duration of the corporation.

State ex rel vs. Payne, 129 Mo., l. c., 477.

Ralls Co. case, 138 Mo., 332.

4. The claim of fee simple to the road bed as a defense is untenable, because:

1. The company had no power to acquire title in fee simple to the road bed. The old company is authorized to construct a road bed, but it is not granted power to own the road bed in fee simple. Corporations have only such implied powers as are necessary to carry out the purposes of the corporation, and the ownership of the road bed in fee simple was not necessary.

Sessions Acts, 1851, page 332. No. 2.

II. There is no evidence that the old company at any time attempted to obtain title in fee simple to the road bed.

III. The deeds to the new company are insufficient proof of title as there is no competent evidence that the grantors had any title to the road bed, or even to the adjacent property, and even if they had, their title is subject to the public easement.

IV. The old levee road proper had for many years been used as a county road prior to the organization of the company and was burdened with a public easement which adjacent owners could not convey.

V. Even if the present company acquired and possesses the fee simple title to the land over which the road passes, such title is subject to an easement in the public, an easement that is indefeasible and perpetual, "Once a highway, always a highway." A turnpike road is regarded as a public easement and not as private property. Every traveler has the same right to use it, paying the toll established by law as he has to use any other highway.

Ralls Co. case, 138 Mo. 341.

5. No constitutional question is involved. We do not seek to take any property without compensation or without process of law. We merely seek by process of law an adjudication as to whether or not the right or franchise to take tolls has expired.

6. The session laws of 1901, page 235, enacting a

new section in lieu of No. 9547 of the Revised Statutes vests the control and management of all roads, constructed by turnpike companies where charters have expired, in the County Court, and where tolls are being collected on such roads, directs the prosecutfng attorney to bring an action on "to enjoin, restrain and prohibit such corporations from collecting such tolls." This is merely an enactment into statutory law of the decision in the Ralls County case. The effect of the enactment should be to absolutely prevent any substantial modification of the law as laid down in that case.

7. Injunction is a proper remedy.

8. This court is without jurisdiction to determine the appeal.

9. There is no federal question in the case.

Mills et al vs. County of St. Clair, 8 How. 567.

Davidson vs. New Orleans, 96 U. S., 97.

New Orleans vs. N. O. Waterworks Co., 185 U. S., 336.

Satterlee vs. Matthewson, 2 Peters, 380.

Watson vs. Mercer, 8 Peters, 88.

Charles River Bridge vs. Warren Bridge, 11 Peters, 583.

Bank vs. Buckingham, 5 How, 317.

Case cited in note, 51 L. Ed., 231.

Miss. & M. R. Co. vs. Rock, 4 Wall, 177.

OPINION OF R. A. ANTHONY, Judge of the Circuit Court of St. Francois County, Mo., Filed in This Cause.

Relator seeks by this action to abate and perpetually enjoin respondent, its officers, agents, servants, successors and assigns from further obstructing a highway and preventing free travel thereon by maintaining toll gates and collecting tolls on a turnpike road, beginning at the City of Cape Girardeau, thence in a southwesternly direction along the eastern side of the bluffs, thence southeasternly over and across what is known as the Rock Levee, crossing the swamps to the bluffs in Scott county.

Relator alleges that said road is a public highway and has been such for more than thirty years; that the defendant is a corporation organized under the laws of this state, and that without authority it maintains on and across said highway, at various points, bars and obstructions commonly called toll gates, and that it prevents the public from making free and proper use of such highway, and that such toll gates are a continuous public nuisance.

Respondents replying to relator's petition enters a general denial and then alleges: that no portion of said road was ever a free public highway; or that the public ever had any interest in said highway; that said toll gates and tolls collected are authorized by law; that it

is a corporation duly organized and as such is authorized to own a turnpike road as above described; that the portion of its road which passes across the big swamp was constructed in the years 1853 and 1855 by its grantor, "the Cape Girardeau and Scott County Macadamized Road Company;" that in the years 1872 and 1873 the said last named company procured its right-of-way along the north side of said swamp by condemnation, donation and purchase, and finished the construction of its road to the City of Cape Girardeau; that said road so constructed to the City of Cape Girardeau was maintained and kept in repair from the time of its construction up to the present time by respondent and its grantor; that same has been used as a public thoroughfare, travelers thereon paying the tolls at all these times fixed and exacted; that the expenditures for maintaining said road have about equalled the receipts from tolls; that dividends to stockholders have been very small—not enough to reimburse them for the construction of said road; that the said Cape Girardeau and Scott County Macadamized Road Company was created by act of the Legislature, approved February 24th, 1853, and then sets out the provisions of the act; that respondent acquired the said road from the Cape Girardeau and Scott County Macadamized Road Company, its grantor, by issuing to said stockholders of the said grantor company fifteen thousand dollars of its paid up capital stock for its said road; that relator's demand is in violation of Sections 4, 15, 21, 30 and 32, Article 2 of the State Constitution, and Section 8, paragraph 3, and Section 10, paragraph 1, Section 4, Article 4, and 5th and 14th Amendments of the Federal Constitution; that respondent by purchase from its said grantor company, and from individual land owners, is the owner in fee of the road bed of said highway, and

that the relator or the public has no interest therein.

Relator replying thereto denies all the allegations of respondent's answer and avers that the ground upon which said toll road was constructed over the big swamp was prior thereto a public highway.

Statement of Facts.

By an Act of the Legislature, approved February 24th, 1853, (laws 1853, page 337,) "The Cape Girardeau and Scott County Macadamized Road Company," with a capital stock of fifteen thousand dollars, was created a body politic. The company was given the exclusive privilege of constructing a macadamized road across the big swamp, in the counties of Cape Girardeau and Scott, where said swamp commences below the City of Cape Girardeau, and running across said swamp a distance of three or four miles, with the privilege of extending the same to the City of Cape Girardeau."

The road across the swamp was constructed immediately, toll gates erected, and it has been operated as a toll road ever since. In the early seventies the road was extended, as contemplated by the act, to the City of Cape Girardeau, which has also been operated as a toll road up to the present time. The right-of-way for a part of the last constructed road was obtained by condemnation proceedings. It does not appear that the Cape Girardeau and Scott County Macadamized Road Company ever obtained any portion of the right-of-way by any kind of deed of conveyance, except in one instance. The act above referred to provides: "The privileges granted in this charter shall continue for fifty years."

From the time this turnpike road was first constructed it has been used continuously by the public as a thoroughfare and highway, the only limitation to such use being the right exercised at all times by the company, created by said act, and the respondent to take and collect tolls fixed by the act itself.

On May 26th, 1903, the respondent, the Scott County Macadamized Road Company filed articles of incorporation with the Secretary of State to exist for a period of fifty years. The articles allege: "That the undersigned have formed themselves into a corporation for the purpose of constructing and owning a macadamized and gravel road under Article 5, chapter 12, R. S. 1899." The road described in the articles is the same as had recently been operated by the Cape Girardeau and Scott County Macadamized Road Company.

On May 27th, 1903, a contract was entered into, signed by Louis Houck, president of the "Cape Girardeau and Scott County Macadamized Road Company," and Giboney Houck, president of the "Scott County Macadamized Road Company," the purpose being to consolidate the two companies under Section 1221, R. S., 1899. Since May 27th, 1903, the respondent has been operating said toll road, and is now engaged in operating same and taking tolls from travelers thereon.

On May 27th, 1903, Louis Houck and others, directors and managers of the Cape Girardeau and Scott County Macadamized Road Company prior to the 24th day of February, 1903, in consideration of one dollar and the issuance to the various stockholders of the Cape Girardeau and Scott County Macadamized Road Company of shares of its capital stock equal to the number of shares held by each of the stockholders of the said

Cape Girardeau and Scott County Macadamized Road Company, conveyed to respondent the real estate, property, assets, rights and franchise of the Cape Girardeau and Scott County Macadamized Road Company, including its road bed and right-of-way, toll gates, etc.

A quit claim deed from K. H. and W. L. Killibrew to Cape Girardeau and Scott County Macadamized Road Company dates June 17th, 1892, "to hold for the purpose of operating and owning thereon a macadamized and gravel road forever, either by itself or its successors or assigns, provided however if at any time said gravel road company, or its successors or assigns should abandon said gravel road and business of operating and running the gravel road over the said strip of ground, that then the said strip of ground shall revert to the parties of the first part or their assigns."

Then follows several quit claim deeds to respondent covering various portions of the right of-way of said road.

There was considerable documentary evidence and testimony of witnesses offered on the question as to whether a public highway had existed along the route of the road in question prior to 1851. No records have been offered showing the establishment of a county road by order of the County Court, but the evidence does show that the portion of the road crossing the big swamp, or what was known as the rock levee was traveled by the public prior to the construction of the toll road. It is not deemed necessary more specifically to review the evidence on this question in view of the final conclusion reached by the court.

I.

Respondent first contends that the charter of the Cape Girardeau and Scott County Macadamized Road Company gave it perpetual succession; in other words that under its charter its life was not limited, and that it could continue on forever exercising the rights of a turnpike company. That this being true it had the right to convey its franchises and property and to consolidate with the respondent.

The act incorporating said company, Laws 1853, page 337. Section 1, after naming the incorporators, fixing the name of the company and the amount of capital stock, adds: "And may and shall have perpetual succession as such, and may make and use a common seal, and the same to alter at pleasure." This is the only clause in the act indicating any intention on the part of the Legislature to clothe the company with the character of perpetuity. Section 8 of the act is as follows: "The privileges granted in this charter shall continue for fifty years; provided that the County Courts of the Counties of Cape Girardeau and Scott may, at the expiration of twenty years, or at any time thereafter, purchase said road at the actual cost of construction, and make it a free road." The latter clause giving the County Court power to purchase the road at the expiration of twenty years, *or any time thereafter*, must necessarily be limited to the preceding clause, which continues the charter privilege for fifty years. It can not have the effect of perpetually extending the charter life.

Many cases are cited by respondent to sustain its contention. Upon an examination of them they are found to concern educational or charitable corporations. In the case of Westminster College, 175 Mo., 52, the court speaking of the statute limiting the duration of all corporations to twenty years, when no other time is limited in its charter, says: "But whilst that section in its terms seems to apply, it would be to defeat the evident purpose of the act of incorporation. * * * Educational institutions of this kind are not established with a view to being continued for a brief period only, or indeed for any limited period. In their very nature they are designed to be perpetual."

The case of State ex rel vs. Payne, 129 Mo., 468, determines this contention against the respondent. The first section of the charter construed in that case gave to the Kansas City Gaslight & Coke Company "perpetual succession." Says the court: "The general rule applied in the construction of charters secured under special legislative grants requires all doubts to be solved in favor of the state and the general public, and against the state's grantee. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation and in favor of the public. The word perpetual, as used in the act expressly qualified the succession and not the duration of the corporate existence. In the connection used does it imply that the Legislature intended to grant the corporation unlimited existence? The word itself does not necessarily so imply. It has more than one meaning, as 'everlasting,' 'continued,' 'uninterrupted.' All lexicographers give these, or equivalent words as proper definitions of the word 'perpetual.' The word 'succession' in its common legal use denotes

the devolution of title to property under the laws of descent and distribution. It is defined as the coming in of another to take the property of one who dies without disposing of it by will. Title to corporate property and franchises is held continuously and uninterruptedly by and in the name of the corporation, and not in the name of the various stockholders. There is no devolution of title in the case of the death of a member or stockholder. The succession is not interrupted but continuous in the corporation. The succession is continuous during the life of the corporation, whether it be for years or for an unlimited time. * * * It will be found by reference to all the authorities that a grant of capacity to take in 'perpetual succession' refers rather to the continued legal identity and succession than to continuous or perpetual succession. * * * The immortality of a corporation means only its capacity to take in perpetual succession as long as the corporation exists. * * * When it is said that corporations have perpetual succession it is meant that they have continuity only during any limited period of time, which may be fixed by the law of the creation."

By express words the charter life of the Cape Girardeau and Scott County Macadamized Road Company is limited to fifty years. Under the law as laid down in the foregoing case by Judge McFarlan the words "perpetual succession" as found in the act operated to keep alive its franchises and privileges continuously and uninterruptedly for the full period of fifty years, but no longer.

II.

Respondent next contends that its grantor, the "Cape Girardeau and Scott County Macadamized Road Company," owned the fee in its right of-way. No deed was offered in evidence conveying the fee of any of the right-of-way to this company. A part was obtained by condemnation proceedings and it is unnecessary to cite authorities to show that no fee simple interest could have been acquired by it in any such proceedings. The only deed in evidence to this company is that of K. W. and W. L. Killibrew, which expressly creates a reversion in themselves and their heirs. Whatever interest was acquired by this company to other portions of the road was by user and common consent, which could only amount, under its charter, to an easement. The statutes and cases cited under this head by respondent are not to the point.

III.

The next inquiry will be as to the nature of turnpike, gravel or plank roads, and in connection therewith the meaning of a public highway. In the examination of cases decided in the various states, it should be borne in mind that the statutes in some states provide for the extension and reorganization of turnpike companies. Some of the cases cited by respondent were based upon these peculiar statutes. The best con-

sidered case wherein the general doctrine of public highways and turnpike companies has been enunciated, is that of people ex rel Vivian vs. Virginia Canon Toll Road Company, (Col.,) 45 Pac. R,, 398. In that case a company was formed in 1865, for the purpose of establishing a toll road. The company's existence was for a term of twenty years. In 1881 the respondent company was formed for the purpose of acquiring, and did acquire, as far as they could be alienated, all the rights, property and franchises of said first company. This action was brought in 1896, to exclude the respondent from its assumed franchise to collect tolls, and that the corporation be dissolved. A demurrer to the petition was overruled, which action of the lower court was sustained by the Supreme Court. The court, through Campbell, J., among other things, says: "A toll road is a public highway, differing from ordinary public highways chiefly in this; that the cost of its construction in the first instance is borne by individuals or by a corporation, having authority from the state to build it, and further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof, constitute a dedication of the same as a public highway. The right of a corporation or of an individual to exact toll is not of common right, and in this country, does not exist in the absence of a grant from the Legislature. The power of collecting tolls is a part of the sovereign power of the state, which the Legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with and restrictions which the Legislature may see fit to impose, and the grantee takes subject to all such limitations; and the grant of the right is the equivalent of, or compensation for, the cost of

building and maintaining the road. * * * * * But if we assume that the wagon road company might alien its franchise to collect tolls, and that the defendant toll road company now has, by purchase, all the tangible property of the former company, and also the franchise to exact tolls, which its grantor possessed, it must logically follow that as the result of such acquisition the grantee company has only the same powers which its grantor had, and no different or enlarged powers. In other words, whatever limitations or burdens existed against the grantor still exists as against the grantee. The inquiry then is: What is the extent of the powers of the wagon road company? Under the territorial act of incorporation the wagon road company's existence as a corporation expired in 1885. It was then legally dissolved as a corporation, and was thereafter incapable of exercising its franchise to collect toll. Neither could it, by a conveyance, made during its incorporate life, impart to any other corporation, or to a natural person, the power to continue the exercise of its corporate franchise after that franchise itself expired by limitation of law. The limitation in the incorporation act of the territory of 20 years as the term of existence of the company operates in the same way as though by express words the exercise of the power to collect tolls was limited to 20 years.

Elliot, Roads and S., 83.

Am. and Eng. Encyc. of Law, 324, et seq.

But plaintiff in error insists that its property is valuable only in case it has the right to collect tolls, and therefore, that such use of its property is of itself a property right, and unless there is some way whereby it can

enjoy this use of its property after its corporate life is ended, practically it is deprived of its property without due process of law. The argument proceeds upon a false premise. In the eye of the law, the toll road was dedicated by its owner as a public highway. While in one case, (People vs Newburgh & S. Plank Road Co., 87 N. Y., 1,) it was held that if a private corporation owns the fee on which the way exists, the public does not acquire the right to use the way upon the expiration of the charter—which decision has been said to be contrary to the weight of authority, (Elliot Roads & S., 54,) yet where the corporation has only an easement, as is the case here, and not the fee, the authorities are unanimous that upon the expiration of the charter the way becomes a highway. 27 Am. & Eng. Encyc. Law, supra and cases cited. Once a highway always a highway, until vacated by the proper authorities, is the general rule. The easement in, or the right to pass over, the roadway which the corporation laid out, belongs to the public, subject to the necessity of paying tolls only for such length of time as the corporation exists. The contract between the state and the corporation contained in the charter, or resulting from the act of incorporation contained in the charter, or resulting from the act of incorporation under the general laws, is that the corporation shall possess during its corporate life the power of collecting tolls, which is regarded as a compensation and a full equivalent for the cost of construction and operating the road. The corporation accepts the grant subject to this condition, and supposing at least, that the business will prove remunerative. This right to collect tolls, not belonging to the corporation, either as a matter of common right or for an indefinite time, as a grant from the Legislature, but for such length of time as the corporation itself is permitted to do busi-

ness, remains the property of the company only until the dissolution of the expiration of its charter, and after this is neither the property of the corporation nor of its stockholders, but reverts to the state. This property does not, therefore, like the tangible property of a corporation, pass to its stockholders, subject to the rights of creditors, for the obvious reason that the franchise, as originally granted, was limited to 20 years. It is no answer to this proposition to say that the corporation is deprived of that which is valuable, for the corporation is deprived only of that, which by implication, it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise the result would be that a toll road company, which under our statute, is limited to 20 years, might indefinitely prolong its existence and perpetuate its franchise, contrary to the express provision of Section 11, article 2, of our bill of rights which prohibits the irrevocable grant of franchises by the General Assembly, (see Sec. 15, article 2, Constitution of Missouri); for just before the termination of its corporate existence, its stockholders could, (as attempted to be done here), form a new corporation, to which the property and franchise of the old one would be transferred, and the business continued, and when this second corporation was about to expire, a third one could, in like manner be formed, and so on for all time; and thus, indirectly, the legislative will could be thwarted, and the constitution, with impunity evaded, and the perpetuation of franchises be accomplished and a monopoly established, contrary to the letter and spirit of our law. The authorities, so far as called to our attention, or as we have examined them, are in harmony with this conclusion. In addition to those already cited, there are:

Douglas vs. Road Co., 22 Md., 219.

State vs. Maine, 27 Conn., 641.

Turnpike Co. vs. Illinois, 96 U. S., 63.

People vs. Anderson, & U. V. R. Co.,
76 Cal., 190; 18 Pac., 308.

People vs. Davidson, 79 Cal., 166;
21 Pac., 538.

State vs. Lake, 8 Nev., 276.

State vs. Dayton & V. Toll Road Co.,
10 Nev., 155.

Pittsburg, etc. R. Co. vs. Com.,
104 Pa. St., 583.

McMullen vs. Leitch, 83 Cal., 239;
23 Pac., 294.

Blood vs. Woods, 95 Cal., 78;
30 Pac., 329.

State vs. Lawrence Bridge Co., 22 Kan., 438.***

The right to collect tolls as we have seen, does not exist as a common right. It is conferred by the Legislature for some proposed good. The laying out of a highway by a private corporation, at its own expense, and the opening up of the same for travel, where no such facilities existed before, subserve a public good; and the payment of tolls by the public for the privilege of passing thereover is only another form, or rather is

in lieu of taxation for maintaining a highway. But where the right to collect tolls ceases with the expiration of the term of the corporation constructing the road, the public then may use the highway without charge. It follows that not only is no public good subserved by permitting another corporation thereafter to collect tolls but the rights of the public are seriously interfered with. This business of operating a toll road is not like that of an ordinary mercantile corporation organized under our laws, which merely transacts a business that may be engaged in, as a matter of right, by any natural person or private corporation organized therefor, and which involves no function of a public nature. With respect to corporations of this class, there is no reason why such private business may not be indefinitely extended by corporations successively formed at stated periods of time to assume and carry on the business of previously existing corporations. While it may safely be conceded that the organization and carrying on of its business by the defendant were lawful, in the sense that it might collect tolls, so long as the company which constructed the road might do so, yet the collecting of tolls thereafter was not lawful.

State vs. Beck, 81 Ind., 500.

Elliot on Roads and Streets, Sec. 69, gives this definition of a turnpike road: DEFINITION—A turnpike is a road constructed and maintained by a private corporation, or by individuals, under authority of law, with the right to gather toll from those who travel upon it, and it is the franchise of gathering toll which impress it with its essential characteristics. It is a highway, notwithstanding the fact that the beneficial interest in the form of tolls is in the private corporation or company.

Its charter as a highway for travel is not, in contemplation of law, affected by the fact that all who use it may be compelled to pay toll. It is the theory of the authorities that tolls are allowed the turnpike company to reimburse it for constructing and keeping the road in repair for safe and convenient use, and that tolls are the equivalent of taxes. It is the duty of citizens to maintain the road, and in compelling the performance of this duty by authorizing the turnpike company to collect toll, the Legislature simply changes the method of collecting from the citizens the expense of maintaining the road, and does not, so it is adjudged, impose upon them any additional burden."

Again Elliott, in his excellent work on roads and streets, section 70, has this to say: "It has been held that if the private corporation owns the fee of the land on which the way exists, the public does not acquire a right to the use of a highway upon the expiration of the charter of the corporation, (citing People vs. Newburg, etc. Plank Road Co., 86 N. Y., 1.) It is doubtful if the doctrine of this case can be sustained. It is an old maxim that "Once a highway, always a highway," and it may justly be held that it applies as well against private corporations as against individual land owners. A corporation accepting a charter authorizing the construction of a public highway ought to be held to take the franchise granted, upon the condition that upon the dissolution of the corporation the road shall remain open to the public. The right to take tolls for the specified period should be deemed to be all the benefit that the corporation was authorized to receive, and, having received this, there should be no right to close the road against the public travel. * * * * The fees may still remain in the successors of the turnpike company, but,

just as in the case of an individual owner, it is burdened with the public easement. In granting the right to lay out and maintain a public toll road there is no implication that with the expiration of the corporate existence of the highway shall be closed; on the contrary, the plain implication is that the highway, having once been established, shall not be discontinued, except in strict conformity to law, or upon abandonment by the public."

Judge Thompson, in his exhaustive work on Corporations, section 5938, says: "When a toll road is abandoned by the corporation possessing the franchise of maintaining it and collecting toll thereon, then it becomes a free public highway, and this without reference to the manner in which the corporation may have acquired the easement, whether by purchase or condemnation, or by the appropriation of existing public highways. The estate of the corporation being merely an easement burdened with the public duty of maintaining the road, when it abandons the duty it loses the estate, and thereafter it has no right to complain that some new servitude has been imposed upon it. It can not, for instance, after having clearly abandoned its public duty of keeping up the road, complain that a telephone or telegraph company has established its line upon it, nor can it abandon its duty of maintaining its road in proper state of repair and at the same time close it against the public, although it may have acquired its right-of-way by purchase and not by condemnation. The reason is that in consequence of the establishment of such improved road, other public highways which might be available to the public pass into disuse and dilapidation; and that, consequently, such an act on the part of the toll road company takes the public at a dis-

advantage, and in effect deprives them of the use of any practicable highway whatever. A more difficult question is presented as to the effect of an abandonment on the rights of the owners of the fee—whether upon the public taking possession of the road as a common highway they are entitled to additional compensation. This must depend upon what kind of an easement was originally contemplated when the toll road was established, whether an easement for the incorporated life of the toll road company or a perpetual easement. If only an easement for the incorporated life of the toll road company, then it would seem clear that the owner of the fee has such an interest in the reversion as entitled him, upon the fact of abandonment, to a new assessment of damages for the perpetual easement required by the public. Judicial theory in California is to the effect that toll roads constructed under the Act of 1853, of that state, became public highways by dedication, subject to the right to collect tolls for a limited period; so that when this limitation period expires the dedication to the public remains, and the road may be declared by the supervisors, and neither the corporation nor its stockholders thereafter have any interest for which compensation can be demanded, and the owners of the fee will not be entitled to any further compensation.

"But in that state a turnpike company may be organized under the provisions of the code and extending its existence, prolong its right to collect tolls beyond the period originally limited for its existence."

In the case of People vs. Davidson, (Cal.,) 21st Rep., page 538, the court in speaking of toll roads or turnpikes, among other things says: "Such roads are public highways. They are constructed like other public highways for the convenience of the public, in the

hope of profit to their proprietors, it is true, yet for a public purpose; and travelers have a right to use them on paying the specified toll. The law upon this subject is declared by the Supreme Court of Massachusetts as follows: "We think that a turnpike road is a highway, established by public authority for public use, and is to be regarded as a public easement and not as private property. The only difference between this and a common highway is that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority and made at the expense of individuals in the first instance, and the cost of construction and maintainance is reimbursed by toll levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway.

Com. vs. Wilkinson, 16 Pick., 175."

Speaking of a plank road, the Supreme Court of Illinois said: "By act of constructing it and opening it for use, and being used on payment of tolls, it was as emphatically dedicated to the public as it could have been by deed or dedication acknowledged and recorded. The elements of a complete dedication are formed in the permitted use of the road by the public, and building it for such purpose, and the subsequent use of it by the public without denial or interruption."

Craig vs. People, 47 Ill., 487.

In the California case, 21 Pac., 538, this language is used in commenting on the Illinois case: "This language is as applicable to toll roads as plank roads and

we think it is a correct statement of the law. It is claimed that the evidence must not only show a dedication or abandonment of the road, but also an acceptance of it by the public as a public highway. But no formal acceptance was necessary; it was enough that the public used the road for the purpose of travel." Also this further language in the same case: "It is claimed for appellant that before his road can be declared a free public highway he must be paid an equitable sum for his interest in it. But by his own acts, and presumably with full knowledge of the law, appellant turned over to the public the full use of this land for a road, and vested in the public an irrevocable easement. It is not a case, therefore, where private property is sought to be taken for public use without just compensation. In some states compensation is made to toll road owners at the expiration of their franchises, but in those states it is expressly provided by law that such compensation shall be made."

Again in the case of ——— 83 Cal., 239 the court says: "The court is of the opinion that when the toll road in question was constructed in 1867, by a corpopation formed under the act of 1853, it became a public highway by dedication, subject to the right to collect tolls for a limited period. This period has expired, but the dedication to the public remains. Neither the plaintiff nor the corporation which constructed any road on the termination of any franchise to collect tolls, had any interest for which either of them can demand compensation."

The case of State ex rel vs. Gravel Road Company, 138 Mo., 332, does nothing more than to reiterate the foregoing principles and apply them to the facts of that case. It is very clear from a careful analysis of this

case that the general doctrine of turnpike roads and highways, as announced by the Colorado Supreme Court, is the law in this state. Counsel for respondent, with much ability and ingenuity, have attempted to show that this case (in the 138 Mo.,) known as the Ralls County case, is to be distinguished from the case at bar. In so far as the facts are concerned this is true. One of the main distinguishing facts of that case is that the Ralls County turnpike was originally constructed on a previously established public highway by and with the consent of the County Court. Many other differences are pointed out which do not appear to be very material. Judge Gantt did not base his conclusions upon the peculiar facts of that case, but that the general law applicable to highways and turnpike or toll road companies were applicable to the conditions and facts as found in that case.

IV.

Relator has introduced some evidence tending to show that a road has been established across the big swamp before the passage of the act incorporating the Cape Girardeau and Scott County Macadamized Road Company, and that while the extension of this road from the north end of the levee to Cape Girardeau was not constructed upon a public road, yet it was built along the general route of a public road. However, under the facts in this case it would seem not to be very material whether the turnpike road in controversy was constructed along and over a public highway or not. When the Cape Girardeau and Scott County Macadamized Road Company was created it became a quasi public corpo

ration, an agent for the state, for the purpose of establishing a public highway over the route mentioned in its charter. As a full consideration for constructing and maintaining such turnpike it was granted the exclusive franchise of collecting tolls from the public for a period expressly limited to fifty years. The charter or contract between it and the state is unambiguous and clear in its terms. There is nothing in it to lead the company to believe that its rights or franchises would extend beyond fifty years, or that it would acquire any perpetual or fee simple interest in the right-of-way of its road bed. The act of the Legislature in creating the charter, the act of the company in accepting its provisions by constructing, maintaining and operating the road and receiving the tolls expressly fixed by the Legislature, together with the acquiesence of the owners of the fee over which the road passes and the constant and continuous use of same as a public highway by the public for nearly fifty years, operated as a dedication of the highway to the public. By virtue of its contract with the state, the rights of the Cape Girardeau and Scott County Macadamized Road Company terminated on February 24th, 1903, and the said highway then ceased to be a turnpike or toll road, but its character as a public highway remains and the public is now entitled to its free use.

V.

But it is contended by respondent that this action can not be maintained, because the expiring of the charter of the original company on February 24th, 1903, could not and did not impair or destroy the road bed,

and it must be regarded as property within the meaning of both the State and Federal Constitutions, and therefore if this action prevails the effect will be to take respondent's property without rendering due compensation therefor. The prior corporation obtained no fee simple title to its right-of way. The only right it had to the right-of-way was the franchise of taking tolls, which was not a perpetual right, but absolutely terminated upon the expirrtion of the charter life. Therefore it had no property rights in the right of way which it could devolve upon respondent by deed or otherwise. As to any tangible property which may have been owned by the Cape Girardeau and Scott County Macadamized Road Company the relator does not seek by this action to interfere with. Although respondent was organized under Article 5, chapter 12, R. S., 1899, for the purpose of "constructing and owning a macadamized and gravel road," yet it does not claim to have constructed this or any other turnpike road, nor does it claim to exercise the franchise of operating and collecting tolls on this road by reason of consent obtained from the County Court of Cape Girardeau County, as provided by Section 1227, R. S., 1899. The deeds obtained by respondent since its incorporation can not operate to deprive the public of its free right of travel over this road. It is not necessary to determine what title, if any, vested in respondent by virtue of these deeds. Whatever title was taken by respondent was taken subject to the easement of the public, its rights having previously became fixed and permanent.

VI.

It is also contended that the evidence shows that

the stockholders of respondent have never been reimbursed for the money expended in the construction and maintainance of such turnpike road. This may be true, yet the stockholders of the respondent company as such, did not construct this road. The only consideration for their stock of the respondent company was a release of their rights in the old company and to whatever property it may have owned. Moreover, the fact that the business of a turnpike company may not be profitable is not a reason recognized by our law for an extension of the charter life of the company. The contract between the state and the first company makes no provision for such a contingency.

The conclusion of the court is that respondent has no legal authority to operate the highway in question as a turnpike or toll road; that the said road is now a free public highway and it will be ordered that an injunction issue to abate and restrain the respondent, its officers, agents, servants, successors and assigns, from further maintaining toll gates thereon, collecting toll from travelers thereon, or from in any way interfering with the public in the free use of said highway.

OPINION OF JUDGE GANTT, C. J.

This is a proceeding *ex officio* by the prosecutin Attorney of Cape Girardeau County to perpetually en join the defendant, its officers, agents, servants, suc cessors and assigns from maintaining a public, contin uing nuisance by obstructing a public highway in sai county, known as the Scott County Road, and some times as the Rock Levee across the Big Swamp, fro the City of Cape Girardeau to the bluffs in Scott cou ty, by maintaining on and across said highway to gates and exacting toll from the public who have occa sion to use said highway. The petition alleges that sai road is a public highway and has been such for mo than thirty years; that the defendant is a corporatio organized under the laws of this state, and without a thority it maintains on and across said highway, at v rious points, bars and obstructions commonly called to gates, and that it prevents the public from making fr and proper use of such highway and that such toll gat are a continuous public nuisance. By consent of parti a change of venue was granted to St. Francois count The defendant then filed an amended answer to plaintiff petition. This amended answer consists of a gener denial and an affirmative defense that no portion of sa road was ever a free public highway, and that the pu lic never had any interest in said highway; that said t gates and tolls collected are authorized by law; that t defendant is a corporation duly organized and as su is authorized to own a turnpike road as above describe and that the portion of this road that passes across t

Big Swamp was constructed in the years 1853 and 1855 by its grantor, "The Cape Girardeau and Scott County Macadamized Road Company." That in the years 1872 and 1873 the said last named company procured its right of-way along the north side of said swamp by condemnation, donation and purchase, and finished the construction of its road to the City of Cape Girardeau; that said road so constructed to the City of Cape Girardeau was maintained and kept in repair from the time of its construction up to the present time by defendant and its grantor; that the same has been used as a public thoroughfare, travelers thereon paying the tolls at all these times fixed and exacted; that the expenditures for maintaining said road have about equaled the receipts from tolls; that dividends to stockholders have been very small, not enough to reimburse them for the outlay for the construction of said road; that the said Cape Girardeau and Scott County Macadamized Road Company was created by act of the Legislature, approved February 24th, 1853; that by the provisions of said act said macadamized road company was granted the exclusive privilege of constructing a macadamized road across the big swamp in the county of Cape Girardeau, with the privilege of extending the same to the City of Cape Girardeau, and that said company should have perpetual succession as such, and that at any time after twenty years, the counties of Cape Girardeau and Scott should have the right to purchase said road for the purpose of making the same a free road, but that in the event that such sale should be made, the said counties of Cape Girardeau aud Scott should pay to said company the actual cost of construction of the same. That relying upon said act, believing that the terms and provisions thereof would be upheld and carried out by the state, said company went to work as soon as could

be done after the passage of this act, to construct and build, and during the years 1853, 1854 and 1855, did build and construct said road and complete the same across the big swamp, in accordance with the requirements of said act, and afterwards, in the year 1873, did extend the said road to the City of Cape Girardeau; that said road was built by said company at great expense for labor and material, to wit, thirty thousand dollars; that said company was at all times willing to sell said road to said counties in accordance with requirements of said act, but said counties wholly failed and refused to buy said road. And defendant further alleges that it acquired from the said Cape Girardeau and Scott County Macadamized Road Company, by issuing to the stockholders of the said company fifteen thousand dollars of the paid up capital stock of said defendant for said road.

Defendant further answering says that the proceedings of plaintiff under this petition violate Sections 4, 15, 21, 30 and 32 of Article 2 of the Constitution of the State of Missouri, and Section 9, paragraph 3, and Section 10, Article 1, Section 4, Article 4, and the 5th and 14th Amendments of the Constitution of the United States, which provides that the private property, to wit, the property of this defendant, can not be taken without compensation and due process of law and defendant pleads said several sections and provisions of the Constitution of the United States and the State of Missouri in bar to the pretended cause of action set up in the petition and proceedings of the plaintiff in this behalf instituted. The defendant for further answer says that it purchased the said road for the sum of fifteen thousand dollars in its full paid up capital stock, which was delivered to the last board of directors and trustees of the Cape Girardeau and Scott County Macadamized

Road Company, and defendant avers that under the laws of the State of Missouri, after the expiration of the charter of the Cape Girardeau and Scott County Macadamized Road Company the last board of directors and trustees of said company had good right to sell and convey the private property and assets belonging to said Cape Girardeau and Scott County Macadamized Road Company to a new company organized for the purpose of owning said road, and that it was the well settled policy, established by the laws of this state to authorize a conveyance of the property belonging to said corporation whose charter had expired to convey its property to a new corporation organized in that behalf. And defendant denies that the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company have ever been reimbursed in full or for any part of the capital invested by it in the construction of the said road, and that under the laws of this state said company was authorized to transfer all the property it owned at the time of the expiration of its charter, to another corporation organized to take over and operate the said road, and this defendant avers that for valuable consideration it has acquired the said road and all the assets, land and property of the said company and is now the lawful owner thereof and in lawful possession thereof and has acquired a fee and title in fee simple to the said road and right of way sixty feet wide from the owners of the fee adjacent and bordering upon the said road and that plaintiff has no interest or right to the said road in law or equity. And having fully answered, prays that the temporary injunction be dissolved and the defendant be charged with its costs. To this answer a reply was filed denying all the new matter set up in the answer, and especially pleaded that by the act of February 24th, 1853,

the Cape Girardeau and Scott County Macadamized Road Company had authority to build a macadamized road from Cape Girardeau to Scott County and keep the levee aforesaid for fifty years; that said right expired on February 24th, 1903, whereupon the said road so constructed by said company was and became a free public highway disburdened of the right of said macadamized road company to take tolls thereon; that said macadamized road company had no power of authority to acquire any fee simple title whatever, and its only right was to acquire an easement or rights of way for the purpose of said road; and that it did not acquire any fee simple title to the road bed and had no authority to sell to this defendant or any one else its right to take tolls or its road bed; that the stockholders of the said macadamized road company after the expiration of its charter in order to deprive the public of its free public highway, organized a new corporation known as the "Scott County Macadamized Road Company," and caused a pretended conveyance to be made by the last board of directors of the old company of the roadway, property and franchises of the said Cape Girardeau and Scott County Macadamized Road Company to this defendant. That the defendant company had no assets; that ro money was paid for its capital stock and the whole transaction was a scheme contrived to attempt to perpetuate the wrongful and unlawful claim to take tolls forever over the road aforesaid. And relator avers that the entire road now claimed by the defendant from Cape Girardeau to the north end of the levee across the levee in Scott county was by its construction and opening to the public, dedicated by the company constructing it, to the public, and thereby became and was and has ever since been a public highway used by the public at all times subject only to the right of the former company

to maintain toll gates up to February, 1903. And that after the expiration of the charter of the said Cape Girardeau and Scott County Macadamized Road Company, all the roadway, rights and franchises of said company vested in the public, and said road became a free public highway by operation of law, and the defendant is unlawfully obstructing said highway by its toll gates to the great injury of the public, and again prays judgment for a perpetual injunction.

Upon the trial the following facts were developed. By the Act of the Legislature, approved February 24th, 1853, (Laws of Missouri, 1853, page 337), "The Cape Girardeau and Scott County Macadamized Road Company" with the capital stock of fifteen thousand dollars was created a body politic. The company was given "the exclusive privilege of constructing a macadamized road across the big swamp in the counties of Cape Girardeau and Scott, where said swamp commenced below the City of Cape Girardeau, and ran across said swamp a distance of three or four miles, with the privilege of extending the same to the City of Cape Girardeau."

In the years 1853, 1854 and 1855 the road across the swamp was constructed, toll gates erected and it has been operated as a toll road ever since. In the early seventies the road was extended as contemplated by the act to the City of Cape Girardeau, and this extension also has been operated as a toll road up to the present time. The right of-way for a part of the last constructed road was obtained by condemnation proceedings. It does not appear that the Cape Girardeau and Scott County Macadamized Road Company ever obtained any portion of the right-of-way by any kind of deed of conveyance, except in one instance. By the 8th

section of the act it provides that "The privileges granted in this charter shall continue for fifty years, provided that the county courts of the counties of Cape Girardeau and Scott may at the expiration of twenty years, or at any time thereafter, purchase said road at the actual cost of construction, and make it a free road." And by the first section of the act it was provided that said macadamized road company "May and shall have perpetual succession as such, and may make and use a common seal, and the same to alter at pleasure." From the time this turnpike road was first constructed it has been used continuously by the public as a thoroughfare and highway, subject only to the right of the said company to take and collect tolls fixed by the 7th section of the said act. On May 26th, 1903, the defendant, the Scott County Macadamized Road Company, filed articles of incorporation with the Secretary of State to exist for a period of fifty years. The articles allege, "That the undersigned have formed themselves into a corporation for the purpose of constructing and owning a macadamized and gravel road under Article 5, chapter 12, R. S., 1899." The road described in the article is the same as had recently been operated by the Cape Girardeau and Scott County Macadamized Road Company. On May 27th, 1903, a contract was entered into signed by Louis Houck, president of the Cape Girardeau and Scott County Macadamized Road Company, and Giboney Houck, president of the Scott County Macadamized Road Company, the purpose being to consolidate the two companies under Section 1221, R. S. of Missouri, 1899. Since May 27th, 1903, the defendant has been operating said toll road and is now engaged in operating same, and taking tolls from travelers thereon. On May 27th, 1903, Louis Houck and others, directors and managers of the Cape Girardeau

and Scott County Macadamized Road Company, prior to the 24th day of February, 1903, in consideration of one dollar and the issuance to the various stockholders of the Cape Girardeau and Scott County Macadamized Road Company of shares of capital stock equal to the number of shares held by each of the stockholders of the said Cape Girardeau and Scott County Macadamized Road Company, conveyed to defendant the real estate, property, assets, rights and franchise of the Cape Girardeau and Scott County Macadamized Road Company, including its road bed and right of way, toll gates, etc. A quit claim deed from K. H. and W. L. Killibrew was made to the Cape Girardeau and Scott County Macadamized Road Company, dated June 17th, 1892, "To hold for the purpose of operating and owning thereon a macadamized and gravel road forever, either by itself or its successors or assigns, provided, however, if at any time said gravel road company, or its successors or assigns, should abandon said gravel road and business of operating and running the gravel road over the said strip of ground, that then the said strip of ground shall revert to the parties of the first part or their assigns." There were also other quit claim deeds to the defendant covering various other portions of the right-of-way of said road. There was also much documentary evidence and testimony of witnesses offered on the question as to whether a public highway had existed along the route of the road in question prior to the year 1851. No records were offered showing the establishment of a county road by order of the county court, but the evidence did tend to show that the portion of the road crossing the big swamp, or what was known as the Rock Levee, was traveled by the public prior to the construction of this toll road. The Circuit Court after a full hearing rendered a decree for the plaintiff

perpetually enjoining the defendant, its officers, agents, servants, successors and assigns from further maintaining toll gates on and across said road and from in any way interfering with the public in the free use of said highway.

1. At the threshold of the consideration of this appeal, we are met with the suggestion of the plaintiff that this court is without jurisdiction to determine it for the reason that no constitutional question is involved in its determination. It will be observed that the defendant in its answer assails this proceeding on the ground that if permitted it would be a denial of due process of law and an impairing of the obligation of its contract with the state, and a taking of its property without just compensation and pleads the sections of the Constitution which guarantees that immunity. Counsel for plaintiff in urging that this court is without jurisdiction insists that that question can not arise for the reason that the state is not seeking to recover the toll house gates and other personal property of the defendant, but is asking only that its citizens be permitted to travel over the surface of this highway without payment of unlawful toll. It is true that this is the purpose of the action, but it is also true that defendant asserts a fee simple title in the road and at least a right to an easement over it, and that this proceeding would impair the obligation of the contract with the state and of its grantor, which if sustained by this court would necessarily defeat the injunction, and while it may be that upon a full investigation of these questions, the result will be reached that no constitutional right of the defendant has been or will be infringed or impaired by this proceeding or the judgment of the Circuit Court. We are of the opinion that a constitutional right is sufficiently

asserted under all the circumstances to put the jurisdiction in this court instead of the Court of Appeals. If transferred to the Court of Appeals these same questions will be presented there, and that court must necessarily decide first, whether a constitutional question was raised, and, second, whether there was merit in it. While we have ruled that we will look sufficiently deep into the record to ascertain whether jurisdiction properly belongs to this court and will not entertain it merely because some section of the constitution is named, still where the question is mooted and we can see that the constitutional question must be passed upon, even though adversely, we think it is our duty to hold jurisdiction of the case, and accordingly we shall dispose of the appeal on its merits in this court.

2. In State ex rel vs. The Hannibal and Ralls County Gravel Road Company, 138 Mo., 332, without discussion a proceeding by injunction to restrain a corporation whose charter had expired from charging and taking tolls upon a public highway was sustained. Afterwards, in State ex rel vs. Gravel Road Company, 187 Mo., 439, the propriety of that ruling was questioned, but as it was ruled in that case that this court had no jurisdiction of the appeal and as a majority of the court did not concur in the views of Judge Marshall that *quo warranto* was the only remedy for such a wrong and that as it was a legal remedy, injunction would not lie, it can not be considered that the decision in State ex rel vs. Gravel Road Co., 138 Mo., 332, has been authoritatively disapproved by this court, or either division thereof. After the case of State ex rel Jump vs. the Gravel Road Company, et al was transferred by this court to the Court of Appeals, that court in the 116 M. A., 175, held that injunction was a proper remedy to prevent a continuing public nuisance and it was prop-

er for the prosecuting attorney of the county to institute such a proceeding *ex officio*. The Court of Appeals while conceding that the state might have proceeded by *quo warranto* against the corporation to oust it of its charter and franchise, proceeded to take up the question on principle whether injunction could also be resorted to, and reached the conclusion that the great weight of authority in this country, as well as in England, was to the effect that in addition to the remedy at law by *quo warranto*, it is now settled that a court of equity may take jurisdiction in cases of public nuisances upon information filed by the attorney general or other proper officer authorized to represent the state. Thus in City of Georgetown vs. Alexandria Canal Company, 12th Peters, 91, the Supreme Court of the United States sustained the jurisdiction of the court of equity, on the ground that equity can give more adequate and complete relief than can be obtained at law. In Attorney General vs. Jamaica Pond, etc., Co., 133 Mass, 363, it was said: "Cases were numerous in which it has been held that the attorney general may maintain an information in equity to restrain a corporation, exercising the right of eminent domain, from and abuse or perversion of its powers which might create a public nuisance or injuriously effect or endanger public interests." Agar vs. the Regents Canal Co., Coop. Temp Eldon, 77, Attorney General vs. Great Northern R. R. Co., 1 Dr. and Sm., 154; Attorney General vs. Mid Kent R. R. Co., L. R. Ch., 3 Ch., 100; Attorney General vs. Great Eastern R. R. Co., 11 Ch. d., 449; Attorney General vs. Great Northern R. R. Co., G DeG. and Sm., 75; Attorney General vs, Cohoes Co., 6 Paige, 133; People ex rel vs. Newburgh Plank Road Co., 86 N. Y., 1; As said by the Court of Appeals: "If the collection of the tolls was nuisance, maintained in the public high-

way, then it was the right of the public to have such nuisance abated or restrained forthwith, and it was the duty of the state in its sovereign capacity to institute such proceeding in that behalf as would render to its citizens immediate reinstatement of a free and unincumbered highway. A proceeding by *quowarranto* would have been of a tedious nature where the relief sought could only be adjusted upon a final determination of the cause, whereas a proceeding by injunction would afford immediate and adequate relief inasmuch as the restraining order of the court could be had forthwith, and the otherwise constant and recurring nuisance be thereby abated during the pendency of the suit, the untimate result being the same in either proceeding. And, indeed, the daily practice of unlawfully exacting tolls from those persons using the road was a standing and continuing infringement of their rights, which could be relieved only by the extraordinary process of injunction, and upon each successive exaction of toll, a right of action arose in favor of the person who was required to pay the same against those persons so unlawfully exacting it, which could be adjusted between the parties only by a multiplicity of suits at law." We have no doubt whatever that this proceeding by the prosecuting attorney *ex officio* to abate this public and continuing nuisance was and is the proper remedy. Since the decision of this court in State ex rel vs. The Gravel Road Co., 138 Mo., 332, the Legislature of the State, at the regular session in 1901, enacted a new section to chapter 151, of Article 5, of the R. S., 1899, known as section 9547, which provides: "The control of all graveled or macadamized roads of this state, which may have been originally constructed by any corporation, whether organized under special act of the Legislature or under general law, whose charter life has expired or may

hereafter expire shall immediately pass to and vest in the county court in which said road may be situated, and in all cases where such corporation, whose charter life has expired by limitation or otherwise, is in the possession of and in control of such roads, and is collecting tolls thereon, it shall be the duty of the prosecuting and circuit attorneys of the respective counties or circuits through which such road or roads may run to prosecute suits in the name of the state at the relation of such attorneys to enjoin, restrain and prohibit such corporation from collecting such tolls, and such suits may be prosecuted in the name or names of one or more citizens of such counties or circuits who reside in the vicinity of such roads, and travel over the same, and in case the prosecuting and circuit attorneys fail or refuse upon request to prosecute the same, any citizen may, in the name of the state, at the relation of said citizen, prosecute such suits to the same extent and in the same manner as the circuit or prosecuting attorneycould have done," Laws of Missouri, 1901, page 235. It would seem that neither our learned brother, who wrote the opinion in State ex rel vs. Gravel Road Co., 187 Mo., 439, nor the Court of Appeals, when preparing its opinion in the same case, in the 116 M. A., 175, had his or its attention called to this new act, which evidently was intended to embody in the statute law of this state the principles approved in State ex rel vs. Gravel Road Company, 138 Mo., 332, and State ex rel vs. Gravel Road Company, 37 M. A., 504.

3. The defendant insists that the Act of February 24th, 1853, incorporating the Cape Girardeau and Scott County Macadamized Road Company, Laws of Missouri, 1853, chapter 337, conferred upon it continuous and uninterrupted succession, and that the charter of the said company did not expire on February 24th,

1903, by limitation, or in other words, at the end of the fifty years prescribed by the 8th section of said act, for its existence. The learned counsel concedes that this court in State ex rel vs Payne, 129 Mo., 468, settled the law adversely to its contention, and that that case was followed and approved in State ex rel vs. The Gravel Road Company, 138 Mo., 332, in which cases it was held that the words "perpetual succession" implied nothing more than a continuous succession during the existence of the corporation as is fixed by its charter. But we are asked by the learned counsel to review those decisions and to hold that notwithstanding the limitation in the act for the exercise of the privileges conferred, that the words "perpetual succession" created a perpetual charter in the Cape Girardeau and Scott County Macadamized Road Company. We have read with interest the argument of the learned counsel, and the authorities to which they refer, but have not been convinced that our previous rulings in the cases just cited were incorrect; on the contrary, we are more than ever satisfied with the absolute soundness of the conclusions reached in those decisions upon this point and that they correctly overruled Fairchild vs. the Masonic Hall Association, 71 Mo., 526. Chancellor Kent, in Kent's 2nd Kent's Com., 267, long ago announced the true meaning of the words "perpetual succession" in corporate charters, wherein he says: "It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal that it is well known that most of the private corporations recently created by statute are limited in duration to a few years." In the 7th American and English Encyc. of Law, (2nd Ed.,) page 684, it is

well said: "When it is said that one of the distinguishguishing features of a corporation is the capacity of perpetual succession, this must be understood to mean a potential, not an actual perpetuity; a capacity as contradistinguished from partnerships and other voluntary associations, to continue in existence indefinitely, up to the period of its constitutional or statutory limitation, in spite of the withdrawal or death of any of its members." And in 10 Encyc. of Law and Proceedure, page 148, it is laid down that these words "perpetual succession" mean in a general sense that the corporation is endowed with the faculty of existing forever unless the same or another statute of the constitution has fixed and limited to the term of its existence. In other words the terms "perpetual succession" is understood to mean indefiniteness of duration and do not refer to length of time but rather convey the idea of regularity or unbroken continuity of existence." See also Field on Corporations, section 57; Ang. and Ames on Corporations, section 8. So that it must be held that by the limitation in the 8th section of the act incorporating the Cape Girardeau and Scott County Macadamized Road Company, the charter of that road expired on the 24th of February, 1903.

4. But it is insisted that notwithstanding the charter of the Cape Girardeau and Scott County Macadamized Road Company expired on the 24th day of February, 1903, that fact did not and could not impair or destroy the title of the said corporation in the said macadamized road, and it must be regarded as property within the meaning of both the state and the federal constitutions and that the last board of directors of said corporation as trustee for the said corporation had the capacity and power to convey the same to the defendant herein or to consolidate with the defendant herein

and thereby transfer the title for the road to the present defendant company, which is incorporated to build and own a toll road. And that this proceeding seeks to deprive the defendant of its property in said road, which it acquired from said defunct corporation, without due process of law and without compensation.

To rid this question of all confusion, it may be well to remark that by this proceeding the state does not claim or seek to recover by this action the toll houses, gates or other personal property of the appellant, but seeks only to restrain and prohibit the defendant from any longer obstructing this road, which the state insists became on the 24th day of February, 1903, a free public highway disburdened of the public and continuing nuisance of toll gates across the same and the exaction of illegal tolls by the defendant, its agents, servants and employees. And thus we are brought to the real contention in this case, to-wit, what was the character of the rights acquired by the Cape Girardeau and Scott County Macadamized Road Company under its charter of 1853? By reference to the act itself, it will be seen that this corporation was created for a public purpose, to-wit, that of constructing a macadamized road across the big swamp in the counties of Cape Girardeau and Scott with the privilege of extending the same to the City of Cape Girardeau, with the privilege of taking tolls from all persons who should travel thereon and to enforce the collection of the same by erecting gates or turn pikes to obstruct the passage over said road until the tolls fixed by the act were paid. And the right to exercise this privilege was expressly limited to fifty years. No power was granted to said corporation to obtain a fee simple title to the land over which said road should be constructed. The only right granted to it was to obtain an easement or right-of-way for its said

proposed road. The nature and character of turnpike roads was fully examined in State ex rel vs. Gravel Road Company, 138 Mo., 332. It was there said "Now a turnpike is a highway differing neither in the responsibility for its proper maintenance nor in any other particular from an ordinary highway, save in the mode of constructing and maintaining it. An ordinary public road is maintained and repaired by taxes; a turnpike is supported and maintained by the tolls exacted. A turnpike is regarded in law as a public easement and not as private property. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway. These principles are well established. Com. vs. Wilkerson, 16 Pick., 175; Craig vs. People, 57 Ill., 487. The public character of the easement is made more manifest when the charter of such companies permits the condemnation of real estate in acquiring their right of-way as was granted by the Act of 1851, section 8, page 261. Knox Co. vs. Kennedy, 92 Tenn., 1. And as if to emphasize this view it has often been ruled that when the charter permitted the use of an established highway for a turnpike it imposed no additional burden upon the adjoining landowners by changing the highway into a toll road, on the principle that the character of the easement was not changed, the road remaining a public highway. Carter vs. Clark, 89 Ind., 238; Chagrin Falls and Cleveland Plank Road, vs. Cane, 2 Ohio St., 419; Panton Pike Co., vs. Bishop, 11 Vt., 198; Callison vs. Hedrick, 15 Grat., 244; Douglas vs. Boonsborough Turnpike Road Co., 22 Md., 219; Wright vs. Carter, 27 N. J. L., 76; Walker vs. Caywood, 31 N. Y., 51." And in that same case the question now presented arose and was determined, and it was said "Having reached this point, (to wit, the date on which the charter rights of the compa-

ny expired,) we are confronted with the question what becomes of the turnpike or plank road after the franchise expires? We think that the weight of authority and sound reason concur in holding that upon the termination of the franchises the road remains as before, a public highway, wholly free from the burden of tolls. Particularly is this true when, as under our statute, the turnpike company merely acquires an easement in the road during its charter life, and not a fee in the land on which the road is laid out. The easement in a turnpike as well as in an ordinary road is vested in the public, and when the turnpike company's charter expires, its easement ceases, but the easement of the public continues until revoked by law." State vs. Maine, 27 Conn., 641.

In Pittsburgh, etc. R.R., vs. Com., 104 Pa. St., 583, the Supreme Court of Pennsylvania states the law in these words: "The question is, did the forfeiture of the charter of the turnpike company wholly destroy the character of the road as a public highway? The right of the company to take tolls was ended. Its liability to keep the road in repair was terminated, yet the road as a public highway remained. No judgment or decree had destroyed its character as such. It had been dedicated to public use. The forfeiture of the charter of the turnpike company destroyed the rights of that corporation, yet the road still remained, in fact and in law, a public highway. Craig vs. the People, 47 Ill., 495. And in McMullin vs. Leitch, 83 Cal., 239, it was held that the road becomes a public highway by dedication at the time of its construction subject to the rights of the company to collect the tolls for the period prescribed by statute and at the termination of such period neither the company or stockholders have any interest in the road for which they are entitled for compensation.

27 Am. and Eng. Encyc. of Law, 324, *et seq.*". In addition to the authorities above quoted the learned circuit judge who tried this cause has added others, among which is people ex rel Vivian, vs. Virginia Canon Toll Road Co., 45 Pac. Rep., 398; 22 Colo., 429. In that case a company was formed in 1865 for the purpose of establishing a toll road. The company's existence was for a term of twenty years. In 1881 the respondent company was formed for the purpose of acquiring and did acquire as far as they could be alienated, all the rights, property and franchises of said first company. This action was brought in 1896 to exclude the respondent from its assumed franchise to collect tolls, and that the corporation be dissolved. A demurrer to the petition was overruled, which action of the lower court was sustained by the Supreme Court. The court through Campbell, J., among other things, says: "A toll road is a public highway, differing from other public highways chiefly in this, that the cost of its construction in the first instance is borne by individuals or by a corporation having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof, constitute a dedication of the same as a public highway. The right of a corporation or of an individual to exact toll is not of common right, and, in this country, does not exist in the absence of a grant from the Legislature. The power of collecting tolls is a part of the sovereign power of the state, which the Legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with any restrictions which the Legislature may see fit to impose, and the grantee takes subject to all such limitations; and the grant of the right

is the equivalent of or compensation for, the cost of building and maintaining the road. **** But if we assume that the wagon road company might alien its franchise to collect tolls, and that the defendant toll road company now has, by purchase, all the tangible property of the former company, and also the franchise to exact tolls which its grantor possessed, it must logically follow that as the result of such acquisition the grantee company has only the same powers which its grantor had, and no different or enlarged powers. In other words, whatever limitations or burdens existed against the grantor still exists as against the grantee. The inquiry then is, what is the extent of the powers of the wagon road company? Under the territorial act of incorporation the wagon road company's existence as a corporation expired in 1885 It was then legally dissolved as a corporation, and was thereafter incapable of exercising its franchise to collect toll. Neither could it, by a conveyance made during its corporate life, impart to any other corporation, or to a natural person, the power to continue the exercise of its corporate franchise after that franchise itself expired by limitation of law. The limitation in the general incorporation act of the territory of twenty years as the term of existence of the company operates in the same way as though by expressed words the exercise of the power to collect tolls was limited to twenty years. Elliot on Roads and S., 83; Am. and Eng. Encyc. of Law, 324, *et seq.* But plaintiff in error insists that its property is valuable only in case it has the right to collect tolls, and therefore, that such use of its property is a property right, and unless there is some way whereby it can enjoy the use of its property after its corporate life has ended, practically it is deprived of its property without due process of law. The argument proceeds upon a false premise. In the eye o

the law, the toll road was dedicated by its owner as a public highway. While in one case (People vs. Newburgh, and S. Plank Road Company, 87 N. Y., 1,) it was held that if a private corporation owns the fee on which the way exists, the public does not acquire the right to use the way upon the expiration of the charter, which decision has been said to be contrary to the weight of authority, (Elliot Roads and S., 54,) yet where the corporation has only an easement as is the case here, and not the fee, the authorities are unanimous that upon the expiration of the charter the way becomes a public highway. 27 Am. and Eng. Encyc. of Law, supra, and cases cited. The easement in, or the right to pass over, the roadway which the corporation laid out, belongs to the public, subject to the necessity of paying tolls only for such length of time as the corporation exists. The contract between the state and the corporation contained in the charter, or resulting from the act of incorporation under the general laws, is that the corporation shall possess during its corporate life the power of collecting tolls, which is regarded as a compensation and a full equivalent for the cost of constructing and operating the road. The corporation accepts the grant subject to this condition, and supposing at least, that the business will prove remunerative. This right to collect tolls, not belonging to the corporation either as a matter of common right or for an indefinite time, as a grant from the Legislature, but for such length of time as the corporation itself is permitted to do business, remains the property of the company only until the dissolution or the expiration of its charter, and after this, is neither the property of the corporation nor of its stockholders, but reverts to the state. This property does not, therefore, like the tangible property of a corporation, pass to its stockholders, subject to the rights

f creditors, for the obvious reason that the franchise s originally granted, was limited to twenty years. It no answer to this proposition to say that the corpora- on is deprived of that which is valuable, for the rporation is deprived only of that which by implica- on, it agreed to relinquish upon the termination of its rporate existence. If the rule were otherwise, the sult would be that a toll road company, which under ir statute, is limited to twenty years, might indefinite- prolong its existence and perpetuate its franchise, ntrary to the express provision of Section 11, Article of our bill of rights, which prohibits the irrevocable ant of franchises by the General Assembly, (see Sec- n 15, Article 2, Constitution of Missouri,) for just be- re the termination of its corporate existence, its stock- lders could, (as attempted to be done here) form a w corporation to which the property and franchise of e old one would be transferred and the business con- ued, and when this second corporation was about to pire a third one could in like manner be formed, and on for all time; and thus, indirectly; the legislative ll thwarted, and the constitution, with impunity, aded, and the perpetuation of franchises be accom- shed and a monopoly established, contrary to the let- and spirit of our law. The authorities so far as called our attention, or as we have examined them, are in har- ny with this conclusion. In addition to those already ed there are: Turnpike Co. vs. Illinois, 96 U. S., 63; ate vs Lake, 8 Nev., 276; Blood vs. Woods, 95 Cal., 78; Pac., 329; Thompson on Corporations, Section 5938; ate vs. Lawrence Bridge Co., 22 Kan., 438."

e learned counsel for the defendant in this e, has with much industry distinguished the facts in Ralls County case, 138 Mo., 232, from those in the e at bar, one of which is that in that case the turnpike

was constructed originally on a previously established public highway, by and with the consent of the county court. But the conclusion reached by this court in that case was not based upon the exceptional facts therein, but upon the general law applicable in this case as in that of any other case in which the turnpike company is incorporated with the right to take tolls for a limited period, and when such a charter right expires, the highway becomes disburdened of tolls and is a free public highway thereafter. And by such conclusion, in no manner, as said in the Colorado case from which we have quoted so freely, no property right of the company is taken for which it is entitled to compensation. In view of the well settled law on this subject, it must be held that the contract of the state with the Cape Girardeau and Scott County Macadamized Road Company terminated on February, 24th, 1903, and the road constructed by it on that day ceased to be a toll road, but its character as a public highway remained, and the public is now entitled to its free use without the payment of tolls. And it follows as a necessary corrollary that on May 27th, 1903, the said Cape Girardeau and Scott County Macadamized Road Company had no right, title nor interest in said public highway other than its toll gates, houses and personal property which it could convey to the present defendant, The Scott County Macadamized Road Company, and nothing passed by the attempted transfer between the said companies. It is too well settled to admit of discussion that the first company only obtained an easement over the said right-of-way and not a fee simple title to the land. Venable vs. Wabash Ry. Co., 112 Mo., 103; State ex rel vs. The Gravel Road Co., 138 Mo., 345, 346; Kellog vs. Malin, 50 Mo., 499; Chouteau vs. Ry. Co., 122 Mo., 385. And, moreover, there was no such corporation

as the Cape Girardeau and Scott County Macadamized Road Company in existence at that date capable of making a conveyance of such right-of-way. Bradley vs. Reppell, 133 Mo, 545. And for a further reason that before said attempted conveyance was executed, the franchise and road bed which the deed purported to pass had already vested in the public free from any power of said defunct corporation to affect a transfer thereof. Learned counsel in the briefs have assailed the constitutionality of the act of April 3, 1901, but as that act is simply declaratory of the law as it had already been decided by this court, we are not impressed with any of the objections alleged against its validity. Much of the brief of the counsel for the defendant is devoted to the evidence for the purpose of showing that Cape Girardeau and Scott Counties had no title by prescription to the highway prior to the incorporation of the Cape Girardeau and Scott County Macadamized Road Company, but according to the views already expressed that was a matter of indifference. The petition in the case is also assailed on several grounds; one is that it does not charge that this particular road belonged to the public, but a reference to the petition will show that it defines this particular road as a public highway, and then alleges that it is now and has been a public highway for more than thirty years, and that the defendant without right or authority maintains on and across said highway, at various points designated therein certain bars and obstructions commonly known as toll gates, and prevents the public from making free and proper use of such highway, and that said obstructions constitute a continuous public nuisance, and prays that the same be abated and the defendants enjoined from further maintaining the same. This is a clear and concise statement of all the facts necessary to be alleg-

ed. Another objection to the petition is that it fails to charge that the stockholders had ever been reimbursed or that the public or any one else had ever offered to pay them back the money they had invested in the road. A complete answer to this—that there is nothing in the act or in the general law which imposes any such obligation upon the public. In People vs. Davidson, 79 Cal., 166, 21 Pac. Rep., 538, it was said, quoting from Craig vs. The People, 47 Ills., 487: "It is claimed for appellant that before his road can be declared a free public highway he must be paid an equitable sum for his interest in it. But by his own acts and presumably with full knowledge of the law, appellant turned over to the public the use of this land for a road and vested in the public an irrevocable easement. It is not a case, therefore, where private property is sought to be taken for public use without just compensation. In some states compensation is made to toll road owners at the expiration of their charters, but in those states it is expressly provided by law that such compensation shall be made." No such provision is made by law in this state. And the theory of our law is that the original incorporators unquestionably estimated that the privilege of collecting tolls for fifty years would fully compensate them for their investment in the construction of the road; whether or not their expectations will be or have been realized does not concern the state or its officers.

The conclusion of the whole matter is that the judgment of the Circuit Court in granting a perpetual injunction against the obstruction of this highway was proper, and it is affirmed.

Fox, P. J., and Burgess, J., concurring.

I.

THERE IS NO FEDERAL QUESTION.

The allegation in the answer upon which this appeal for federal intervention is based is as follows: "And defendant further answering says that the proceedings of plaintiff under this petition violates Sections 4, 15, 21, 30 and 32, Article 2 of the Constitution of the State of Missouri, and Section 9, paragraph 3, and Section 10, Article 1, Section 4, Article 4, and the 5th and 14th Amendments of the Constitution of the United States, and which said several sections heretofore set out in effect provide that private property, to-wit, the property of defendant, can not be taken *without due compensation and process of law.*

The federal jurisdiction depends solely upon this assertion that the provisions of the Constitution of the United States which protect property from being taken without process of law and without compensation have been violated. The same contention was made as to violation of similar provisions contained in the State Constitution, and because of this claim, after Division 2 of the State Supreme Court had rendered its decision, the case was transferred to the Court in Banc, and there again fully argued. The state court was "not impressed" with the contention. If there is in reality no constitutional question, this court is without jurisdiction. We fully believe that even a cursory examination of the record will convince the court that there has been no

attempt to take property of plaintiff in error "without due process of law," or "without compensation," and that the assertion of a federal right has been made solely to furnish a colorable ground upon which to urge another rehearing of the claims already three times adjudicated by separate tribunals, and we feel justified in assuming that in the absense of a federal question this court will not go into the merits of the cause, but will dispose of the writ of error summarily by sustaining our motion to dismiss, heretofore filed.

A brief statement of the facts will show conclusively that there is no federal question. The charter of the plaintiff in error, granted by special act of the State Legislature in 1853, authorized it to construct a certain road in Cape Girardeau County, and to collect tolls thereon. The charter contained a provision that the privileges thereby granted should continue for fifty years. On the expiration of the fifty years, a new corporation was organized and the old corporation attempted to transfer to the new one a right to take tolls upon the highway for an indefinite period; and the new corporation continued to take tolls. In obedience to an act of the Legislature passed in 1901, making it the duty of the prosecuting attorney to bring suits for injunction in such cases, this action was brought. The plaintiff in error appealed and defended the action, asserting that the charter endowed the old corporation with perpetuity, that the right to take tolls continued to exist, that it owned the roadway in fee simple and that the defendant in error had "no right to the said macadamized road or to the said right-of-way, or any part thereof, in law or equity. [Trans. 12.] The replication alleges the expiration of the fifty years limited by the charter, and that thereupon said road becomes a free public highway by operation of law and that the

plaintiff in error was unlawfully obstructing said highway." [Trans. 14.] After submission and hearing it was adjudged in accordance with Judge Anthony's opinion that plaintiff in error "has no legal authority to operate the highway in question as a turnpike or toll road; that the said road is now a free public highway and it will be ordered that an injunction issue to abate and restrain the respondent from further maintaining toll gates thereon, collecting tolls from travelers thereon, or in any way interfering with the public in the free use of the highway."

There was no taking of property of plaintiff in error, otherwise than such as may be inferred from an adjudication that the corporate franchise had ceased, made in a proceeding instituted for that purpose in a court of record having complete jurisdiction of the subject matter and the parties, upon issues formally joined; and such as may be deduced from the resulting order that plaintiff in error be enjoined from preventing the free use of the public highway. Whatever specific property the corporation had or claimed was not in issue and remained wholly unaffected by the adjudication. The issues involved merely the construction by the state court of a charter granted by the State Legislature creating a state corporation. A federal question is no more here a controversy than it is involved in any other case adjudicating contractual rights. The mere assertion that the proceedings contravene the constitution does not confer federal jurisdiction. If it did this court would be compelled to hear and determine thousands of cases from all states of the union in which the only support for federal jurisdiction would be the bare charge that property of one of the parties as a result of the litigation was transferred to some other party without compensation or due process of law. The contention of

plaintiff in error in this regard logically reduces itself to this absurdity.

Could the process of law be more full and complete? The defendant was duly summoned, appeared, answered, submitted to trial upon the merits, cross-examined, introduced evidence, made arguments and submitted briefs. The case was fully presented, no evidence offered by defendant being excluded. From the adverse judgment of the Circuit Court, entered after most careful deliberation, an appeal was had to the Supreme Court of the state. There briefs were submitted and the cause orally argued. Upon another adverse decision and a motion for rehearing, because of the constitutional question suggested, the matter was transferred to the Court in Banc and there again orally argued. And the net result was the determination by three judicial tribunals, without a dissent, that the defendant, was, without right, obstructing a public highway; that the obstruction constituted a nuisance, and that the permanent writ of injunction should issue. If this be not due process of law, how can it be obtained?

Courts of equity have for ages issued the writ of injunction to restrain nuisances. At common law the obstruction of a public highway was treated as a public nuisance. In the State of Missouri by well settled adjudications the writ of injunction is regarded as the appropriate remedy. In 1901, the Legislature which has control of "remedies" formally by enactment, directed the prosecuting attorney to pursue this remedy. The Supreme Court in this cause has laid down no new doctrine; it merely announces what has been held to be the law of the state. The action of the Supreme Court is in harmony with the law prevailing generally in the states of the nation, and with what the courts thereof

ith unanimity regard to be due process of law."

As to the taking of property, no property of the laintiff in error is expressly taken. It is merely enoined from interfering with a property right of others —the right to travel a free public highway. Whatever pecific property it had, it still has. The decision does ot affect it. If it owns the fee simple title to the land t may still exercise all the rights incident to such ownrship of the soil, subject only to the public easement. f it owns toll houses or claims other specific property, he courts of the state are open to it for the assertion of ts claims and the adjudication of its rights.

Plaintiff in error had, under its contract with the state, a right to collect tolls for fifty years, and no onger. Then, as has been adjudicated, upon the expiration of the period, its rights to exclude the public from the free and unobstructed use of the highway ceased. The very question at issue was, whether or not it continued to have a certain property right—the right to take tolls—upon that question it has had its day in court; the decision has been adverse to its claim. Had the finding been in its favor the people would have been precluded. It being in favor of the people why should not the toll gate company be bound?

As to any equity claimed by reason of expenditures made upon the highway we suggest that its position is not unlike that of a tenant for years who makes permanent improvements of the freehold. Upon the expiration of his term he is not permitted to injure the freehold by tearing up and removing the improvements. The state courts have held that there is no equity in its contention, that it is not deprived of any property belonging to it, and no sound reason exists for disturbing this conclusion.

Due process of law has been followed, no property of plaintiff in error has been taken, no constitutional right has been infringed, and this court is therefore WITHOUT JURISDICTION.

"The framers of the constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations necessary to the well being and existence of the states. Were this court to assume jurisdiction and re examine and reverse state court decisions on a doubtful construction that an interest in land held by a patent was a contract, and the owner entitled to constitutional protection by our decision in case of abuse and trespass by an oppressive exercise of state authority, it would follow that all state laws, special and general, under whose sanction roads, ferries and bridges are established, would be subject to our supervision, a new source of jurisdiction would be opened, of endless variety and extent, as, on this assumption, all such cases could be brought here for final adjudication and settlement; of necessity we would be called upon to judge of the fairness and abuse to ascertain whether jurisdiction existed, and thus decide the law and the facts, in short to do that which state courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers heretofore supposed to belong exclusively to state cognizance would be taken from the states and exercised by the general government through the instrumentality of this court. That such a doctrine can not be maintained here has been decided in previous cases, and especially in that of Charles River Bridge vs. Warren Bridge, 11 Peters, 539, where other cases are cited and reviewed."

Mills et al vs. County of St. Clair, 8 Howard 567.

The 14th Amendment (process of law) can not be availed of as a means of bringing to the U. S. Supreme Court the abstract opinions of unsuccessful litigants in the state court of the justice of an adverse decision and of the merits of legislation upon which the decision may be founded.

Davidson vs. New Orleans, 96 U. S., 97.

A claim that a forfeiture of a charter of a waterworks company for maintaining illegal rates by a decree of a state court after a full hearing, impaired the obligation of a contract or deprived the company of property without due process of law or denied it the equal protection of the laws held *to be without color* and to furnish no foundation for federal jurisdiction.

New Orleans vs. N. O. Waterworks Co.,
185 U. S., 336.

A state statute which divests a vested right is not repugnant to the Federal Constitution provided it does not impair the obligation of a contract.

Satterle vs. Mathewson, 2 Pet., 380.

The Federal constitution does not prohibit the states from enacting retrospective laws which may divest vested rights provided they are not *ex post facto* and do not impair contract obligations.

Watson vs. Mercer, 8 Pet., 88.

If to take private property impairs the obligation of the contract under which it is held, this court may be called to determine in almost every case where the pow-

er is exercised, as well where compensation is made, as where it is not made. For if this court can take jurisdiction on this ground, every individual whose property has been taken has a constitutional right to the judgment of this court whether compensation has been made in the mode required by the Constitution of the State. To revise these cases would carve out for this court a new jurisdiction not contemplated by the Constitution, and which cannot safely be exercised.

M'Lean, J., in Charles River Bridge vs. Warren Bridge, 11 Peters, l. c., 583.

The court is committed to the doctrine that a real and not a fictitious federal question is essential to the exercise of jurisdiction.

Cases cited in note 51, L. Ed., 231.

Where the sole question involved is the construction of a charter or contract no federal question is presented.

Yazoo & M. Val. R. R. vs. Adams, 180 U. S., 41.

Miss. & M. R. Co., vs. Rock, 4 Wall, 177.

"The power delegated to us is for the restraint of unconstitutional legislation by the states and not for the correction of alleged errors committed by their judiciary."

Bank vs. Buckingham, 5 How., 317.

II.

The Incomplete Record.

The assignment of errors attacks the reasons, rulings and conclusions of the Supreme Court of Missouri rather than the decree of the Circuit Court. Since the result of the action of the Supreme Court was the simple affirmance of such decree, the only proper question here should be, not whether the State Supreme Court was correct in its reasoning or methods of arriving at a decision but whether the decree below which measures the relief obtained, deprives plaintiff in error of any constitutional rights. That decree which this court is asked to reverse, is not in the record here. A reference is made to it on page 102 of the transcript, which is copied from the printed abstract used in the state courtand refers to the copy filed with the clerk of that court. The Supreme court of the United States, therefore, is being asked to reverse a decree which is not before it. The substance of that decree sufficiently appears from the opinions of Judge Anthony and Judge Gantt. The decree itself is brief—it concisely finds that the franchise has expired, that the toll gates are maintained without right, that they constitute an obstruction to the free and proper use of the highway, and enjoins the continuance thereof. It seems to us that it is not essentially important whether the opinions filed in the cause are correct expositions of the law, if the ultimate adjudication is right. And it therefore seems to us that the original decree should be set forth in the transcript

of the record and the case decided with reference to it rather than to the course of reasoning pursued by either Judge Anthony or Judge Gantt. Not that we deem the matter of any special importance. We have set forth the opinions in our brief as the most conclusive argument we could advance to convince this court that due process of law had been pursued. They show fairness and breadth of view, conscientious investigation of the claims of plaintiff in error, careful deliberation upon the facts and exhaustive examination of the law. Their reasoning is logical, based upon sound propositions of law and fact, and their conclusion can not be successfully assailed.

Conclusion.

The writ of error does not merit serious consideration. Should the court, however, feel impelled to investigate the merits of the controversy it will find the judgment rendered is in harmony with the decisions of every jurisdiction in which similar questions have been passed upon. Those decisions are referred to in our brief and are analyzed and discussed in the opinions heretofore rendered. Upon the soundness of the reasoning and conclusions of the able judges who have already carefully investigated the contentions of the parties, we confidently rest our case.

All of which is respectfully submitted.

T. D. Hines, Relator,
Attorney pro se.

SCOTT COUNTY MACADAMIZED ROAD COMPANY *v.* STATE OF MISSOURI EX REL. HINES, PROSECUTING ATTORNEY OF CAPE GIRARDEAU COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 52. Argued December 7, 8, 1909.—Decided December 20, 1909.

Following the construction given by the state court, *held* that where a charter for a toll-road provided that the privileges granted should continue fifty years subject to the right of the county to acquire it after twenty years, all privileges ceased on the expiration of the fifty years; and the owner of the franchise was not deprived of his property without due process of law, nor was the obligation of the contract in its charter impaired, by an injunction, from further maintaining toll-gates on such road.

207 Missouri, 54, affirmed.

THE facts are stated in the opinion.

Mr. Edward S. Robert, with whom *Mr. Douglas W. Robert* and *Mr. William L. Becktold* were on the brief, for plaintiff in error:

A franchise or charter granted by a State to a quasi-public corporation is a contract the obligation of which cannot be impaired. *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 663.

The decision of a state court, holding as a matter of construction, that a particular charter or charter provision does not constitute a contract, is not binding on this court. *Mobile & O. R. R. Co.* v. *Tennessee*, 153 U. S. 486.

Due process of law requires compensation to be made, or secured, to the owner of private property when it is taken by

a State or under its authority for public use. *C., N. O. & T. P. R. Co.* v. *Kentucky*, 115 U. S. 321; *C., B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226; *Norwood* v. *Baker*, 172 U. S. 269.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the Fourteenth Amendment. *Tindal* v. *Wesley*, 167 U. S. 222; *Smyth* v. *Ames*, 169 U. S. 526.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process, as well as a denial of the equal protection of the laws. *Covington Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *People* v. *Roberts*, 171 U. S. 658, 683; *Railway Co.* v. *Ellis*, 165 U. S. 150; *United States* v. *Express Co.*, 164 U. S. 686; *Railway* v. *Beckwith*, 129 U. S. 268; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Cooper &c. Co.* v. *Ferguson*, 113 U. S. 727.

If an instrument is subject to two constructions, the rule that the construction most favorable to the public should be adopted does not apply, if its application would obviously defeat the legislative intent. *A fortiori* the rule has no application where the meaning of the grant is clear and free from ambiguity. *Moran* v. *Miami Co.*, 2 Black, 722; *St. Clair Turnpike Co.* v. *Illinois, supra.*

Mr. M. A. Dempsey and *Mr. T. D. Hines* for defendant in error:

The charter expressly provides that the privileges granted by the charter shall continue for fifty years. The company and its franchise to take tolls therefore expired February 24, 1903. Session Laws, 1853, 337, 338.

The roadbed in question was a public highway established by public authority for public use, and is to be regarded as a public easement and not as private property. The right to

travel over the road was an easement vested in the public, and when the charter expired this easement continued, disburdened of tolls, but otherwise unaffected. *State* v. *Hannibal County Road Co.*, 138 Missouri, 332; Campbell on Highways, No. 8, p. 8; No. 14, p. 11; *Benedict* v. *Gait*, 3 Barb. 469; *Davis* v. *New York*, 14 N. Y. 516; *St. Clair Co. Turnpike Co.* v. *Illinois*, 96 U. S. 63; 27 Am. and Eng. Ency. of Law, 320; *Pittsburg &c.* v. *Commonwealth*, 104 Pa. St. 583; *State* v. *Lake*, 8 Nevada, 276; *State* v. *Curry*, 6 Nevada, 75; *State* v. *Dayton*, 10 Nevada, 115; *Wood* v. *Turnpike Co.*, 24 California, 474; *Craig* v. *People*, 47 Illinois, 487; *Police* v. *Jury*, 44 La. Ann. 137; *Hayward* v. *Mayor*, 8 Barb. 492; *Hooker* v. *Utica*, 12 Wend. 371; *State* v. *Passaic*, 42 N. J. L. 524; *State* v. *Mayor*, 29 N. J. L. 441; *Kansas* v. *Lawrence*, 22 Kansas, 438; *Blood* v. *Woods*, 95 California, 78; *People* v. *Davidson*, 21 Pac. Rep. 538; *State* v. *Maine*, 27 Connecticut, 641; *Central Bridge* v. *Lowell*, 15 Gray, 106; *People* v. *Newburg*, 86 N. Y. 302; *Heath* v. *Barrymore*, 50 N. Y. 302.

The words "perpetual succession" mean continuous succession during the life of the charter only. Of themselves they do not confer perpetuity upon a corporation. The word "perpetual" qualifies the succession and not the duration of the corporation. *State ex rel.* v. *Payne*, 129 Missouri, 477; *Ralls Co. Case*, 138 Missouri, 332.

The claim of fee simple to the roadbed as a defense is untenable.

No constitutional question is involved. The county does not seek to take any property without compensation or without process of law, but merely seeks by process of law an adjudication as to whether or not the right or franchise to take tolls has expired.

Injunction is a proper remedy. This court is without jurisdiction to determine the appeal. There is no Federal question in the case. *Mills* v. *County of St. Clair*, 8 How. 567; *Davidson* v. *New Orleans*, 96 U. S. 97; *New Orleans* v. *N. O. Waterworks Co.*, 185 U. S. 336; *Satterlee* v. *Matthewson*, 2

Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 583; *Bank* v. *Buckingham*, 5 How. 317; *Miss. & M. R. Co.* v. *Rock*, 4 Wall. 177.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in pursuance of a statute to enjoin the plaintiff in error from maintaining toll-gates upon a road alleged to be a public highway. The defendant justifies under a charter granted by a special act of February 24, 1853, which contained the following section: "8. The privileges granted in this charter shall continue for fifty years; provided, that the county courts of the counties of Cape Girardeau and Scott may, at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road." Mo. Laws, 1853, pp. 337, 338. The defendant says that it has not received the cost of construction, and sets up the Constitution of the United States, Art. I, § 10, the Fourteenth Amendment, and other less material clauses. The reply is that the right to take tolls expired on February 24, 1903, when the fifty years contemplated by the charter had elapsed. There was a trial and a judgment for the relator, which was affirmed by the Supreme Court of the State, and the case was brought here. *State ex rel.* v. *Road Co.*, 207 Missouri, 54.

The plaintiff in error contends that the privileges referred to in § 8 are but three: the life of the corporation brought into being by the charter, the exclusive right to maintain a toll-road granted by § 2, and the right to take higher tolls than those allowed to toll companies organized under a general act then in force; but that it cannot be deprived of its right to take tolls except by a purchase of the road at the actual cost of construction. It says that the provision for the right to purchase at the expiration of twenty years 'or at any time thereafter' imports that the right to make the road free, even after fifty years, can be gained only by pur-

chase, and that the clause makes a contract and creates a right of property which it is beyond the power of the State to impair or take away. The Supreme Court of Missouri took a different view. It held after an elaborate discussion that the plaintiff in error never had more than an easement, that this easement was of a public character charged only with the burden of paying toll during the time allowed by the charter, and that after that time the public had an unencumbered right. The sole question here is whether the construction of the charter and the supposed contract was wrong.

We are of opinion that the decision of the state court was right, and that the meaning of § 8 is so plain that it cannot be made much clearer by argument. "The privileges granted in this charter" means all the privileges, including the privilege of taking toll. The limitation of fifty years would be almost meaningless if tolls were not embraced. The plaintiff in error recognizes the difficulty, and tries to meet it by the suggestion that as applied to tolls the word 'privileges' is to be limited to the excess of the tolls allowed above those mentioned in a general act then in force. But the general act is not referred to in the section granting the right to charge tolls, or, indeed, in the charter at all; it was a law with which the specially chartered corporation had nothing to do. There is not the slightest reason to suppose that there was any implied reference to or thought of it when this act was passed. The words of purchase, 'at the expiration of twenty years, or any time thereafter,' do not convey the meaning that the express limitation of fifty years is done away with in the same section that imposes it, but must be read subject to that more specific phrase, even if 'any time thereafter' practically is cut down to any time within the fifty years, so far as its value to the plaintiff in error is concerned. It was a reservation in favor of the county, not the grant of a new right to the plaintiff in error, and its operation is sufficient if as extensive as the need.

As we are of opinion that the plaintiff in error has no such rights as it claims, even if we assume that it has all the rights of the original corporation created by the charter, it is unnecessary to consider other difficulties in the case.

Judgment affirmed.